(19,204.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 In the Supreme Court of Iowa, January Term, A. D. 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick and Carr & Parker for plaintiff and appellee.

E. B. Evans and Morling & Davidson for defendants and appellants.

Appellants' Abstract of Record.

On the 13th day of January, 1900, the plaintiff filed the following

Petition.

"That the plaintiff is the absolute owner in fee simple of lots 2 and 3 in section 30, T. 97, R. 34, that the said lots were surveyed by the Government and platted and the record of said sur-
2 vey and plats were duly returned to the General Land Office at Washington, D. C., and became a part of the records of said office; that said lots were meandered by the Government surveyor, and said meander lines run with reference to a lake then existing in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation between said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by *mean* conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake; about 1899 the defendants without the consent of the plaintiff entered into possession of all the land between the meander line and the lake proper and are now claiming title to said land, which claim is adverse to title of plaintiff.

"That the plaintiff's title includes all of the land embodied in the south half of said section and his title is complete to all of said land claimed adversely by the defendants. Plaintiff further states that the defendants other than Palo Alto County are engaged in committing waste on said real estate by cutting and carrying away the timber thereon; that the said defendants are insolvent; wherefore the plaintiff prays that the fee simple title to all the real estate described be

established and quieted in plaintiff; that the defendants and each of them be forever barred and estopped from having any title or interest in said real estate adverse to the plaintiff and that the defendants be enjoined from cutting and clearing away any of the timber standing thereon; that in the event the court should determine the plaintiff is not the owner of all of the land included in the south half of said section
3 that the court then determine the extent of the boundary of the plaintiff's land and that the court decree that the plaintiff is the fee simple owner to all the land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line and the south line of section 30 and that title be quieted in the plaintiff and the defendants barred from having any interest or title in said real estate adverse to this plaintiff, and the defendants be enjoined from cutting and removing timber thereon, and such other relief as may seem equitable and a writ issue removing the defendants from said premises and placing plaintiff in possession."

On the 8th day of January, 1900, upon presentation of the foregoing petition the judge issued the following

Order.

"On presentation of the foregoing petition it is ordered that a temporary injunction issue against the defendants, W. L. Hemphill and Richard Ryan, restraining them from cutting and removing any timber from any portion of the south half of section 30, T. 97, R. 34, and from any portion of the land between the meander line of lots 2 and 3 of said section and the waters of the lake. Defendants excepts.

"Dated, Algona, Iowa, this 8th day of January, 1900.

"W. B. QUARTON, *Judge.*"

On the 4th day of March, 1900, Richard Ryan filed the following

Answer.

"This defendant denies each and every allegation in plaintiff's petition not hereinafter specifically admitted; as to whether the Government issued patents to lots 2 and 3 and the plaintiff is the owner of said land the defendant asks the court to require strict
4 proof; as to whether said lots were surveyed and platted by the Government and said survey and plats filed in the General Land Office and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief, and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, T. 97,

R. 34. Defendant states that lots 2 and 3 of said section contains 99.80 acres, as shown by the Government survey and plats of said lots; that the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the Government survey and plats, and that neither said patent nor deeds purport in any manner to convey the land embraced in lots 12 and 13, being a part of the land in controversy, and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13. Defendant states that on the 8th day of March, 1898, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be surveyed certain unsurveyed land in sections 19–20–29 and 30, T. 97, range 34, and sections 25, 36, T. 97, R. 35, that the Commissioner of the General Land Office caused the unsurveyed land in said sections to be surveyed; that said survey was made on the 2d to the 20th days of April, inclusive, of the year 1898; that there *was* surveyed by said Government surveyor 1230 acres of land in the aforesaid sections; that the plat of said survey and the subdivisions of said 1230 acres of land, together with field notes, was duly made by said surveyor and filed in the General Land Office at Washington, D. C., in accordance with law; the land so surveyed became subject to disposal under the laws of the United States for the disposal of public land; under direction of the Secretary of the Interior the register and receiver of the United States land office at Des Moines, Iowa, published notice as required by law that said 1230 acres of land would be open to entry on the 30th day of August, 1898; that prior to the 30th day of August, 1898, defendant had established his residence upon lots 12 and 13 of said section, and on the 30th day of August, 1898, he filed his written application to enter the land embraced in said lots as a homestead, together with the evidence required by law showing his qualification to make homestead entry of Government land; that his application was approved and the defendant paid the required fees and commis-ion to the receiver of said land office; his entry was allowed and became of record, and that said entry is now of record and in full force and effect, and the defendant is now engaged in living upon, cultivating and improving the land embraced in his homestead entry, being a part of the land plaintiff seeks in his petition to have title decreed in plaintiff. Defendant states that the land embraced in his said homestead entry is adjacent to and attached to and is in the same condition as the land involved in the case of Grant *vs.* Hemphill decided by the supreme court of the State of Iowa on the 26th day of May, 1894 (92 Iowa, 218), wherein it was held that 'all of the land in dispute is a part of the unsurveyed domain of the United States to which any one can not obtain title except through the regular Government method adopted by the General Government for the disposal of public lands.' The defendant states that this court has no jurisdiction over the subject matter of this suit; that is over lots 12 and 13 of said section for the reason

that the legal title to the land embraced in said lots is in the Government of the United States, subject to the rights of this defendant to finish and complete his residence and cultivation of said lots, as required by the law.

"Defendant attaches hereto copy of his homestead application marked Exhibit 'A,' copies of his affidavit attached to said application marked Exhibits 'B' and 'C,' copy of homestead receipt marked Exhibit 'D,' copy of homestead entry book and of tract book of the Government Land Office marked Exhibit 'E' and 'F,' all of
6 which are made a part of his answer."

Defendant states that on the 30th day of August, 1898, the plaintiff, George Schlosser, recognizing the validity of the survey made in the year 1898, as herein set forth, filed application to enter lots 13 and 14 of said section, being a part of the land in controversy, as an adjoining farm homestead; that his application was rejected by the register and receiver, notice of which was served on the plaintiff; that thereupon said Schlosser filed in said land office a contest against the homestead entry of this defendant; that a trial was had before the register and receiver upon the contest brought by the plaintiff, the plaintiff and this defendant appearing thereto; the register and receiver rendered their decision in favor of this defendant; within the time allowed for appeal the plaintiff, George Schlosser appealed from said decision; that upon said appeal the said case is now pending before the Commissioner of the General Land Office at Washington, D. C.; that no decision thereon has been had. Certified copy of docket entry of said case is hereto attached marked Exhibit "G," and made a part hereof. Wherefore, the defendant prays that the court will require plaintiff to reply to the allegation of this defendant's answer as set forth in Exhibits A to G, inclusive, and that upon the admission of the plaintiff of the truth of said facts or upon the proof of the allegations contained in said exhibits the court will dismiss the plaintiff's bill for want of jurisdiction, and that the plaintiff's petition may be dismissed with costs against the plaintiff and for general relief.

EXHIBIT "A."

"I, Richard T. Ryan, of Ruthven, Iowa, do hereby apply to enter under section 2289, R. S. of the United States, lots 12 and 13 of section 30, T. 97, R. 34.

RICHARD T. RYAN."

7 "I, Thornton S. Howard, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter, and there is no valid adverse right to the same.

THORNTON S. HOWARD, *Register*."

EXHIBIT "B."

"I, Richard T. Ryan, of Ruthven, Iowa, do solemnly swear that I am a native born citizen of the United States, over 21 years of age; that my application is honestly and in good faith made for the purpose of actual settlement and cultivation."

EXHIBIT "D."

"Receiver's receipt No. 1312.

RECEIVER'S OFFICE,
DES MOINES, IOWA, *September* 19, 1899.

"Received of Richard T. Ryan the sum of $15.07, being the amount of fees and compensation of the register and receiver for the entry of lots 12 and 13 of section 30, T. 97, R. 34.

STEPHEN J. LOUGHRAN, *Receiver*."

EXHIBIT "E."

Register of homestead entries. Application No. 1312. September 19, 1898. Lots 12 and 13, section 30, T. 97, R. 34; 101 acres. Richard T. Ryan, Ruthven, Iowa; fees, $10. Commissions $5.10.

EXHIBIT "F."

Tract book. Land office, Des Moines, Iowa. Lots 12 and 13, section 30, T. 97, R. 34, 101 acres; H. E. No. 1312. Richard T. Ryan, Ruthven, Iowa.

EXHIBIT "G."

George Schlosser vs. Richard T. Ryan, docket entry No.
8 853, lot No. 13, section 30, T. 97, R. 34, October 27, 1898. Contest notice filed by George Schlosser. Hearing set for 10 a. m. September 7, 1898, before the register and receiver of the United States land office at Des Moines, Iowa, at which time Schlosser appeared in person and by his attorney, J. F. Conrad. Ryan appeared in person and by his attorney, E. B. Evans. Each submitted evidence and testimony closed. June 29, 1900, the register and receiver rendered their decision in favor of Ryan. July 27, 1899, J. F. Conrad filed appeal of George Schlosser. August 12, 1899, case reported and sent to the General Land Office.

On the 4th day of March, 1900, Palo Alto County and W. L. Hemphill filed the following joint

Answer.

(As to lots 2 and 3, and the Government survey mentioned in plaintiff's petition; as to survey made under authority of the decision of the Secretary of the Interior of March 8, 1898, mentioned in the answer of Richard T. Ryan, the answer of these defendants are identical with that of Richard T. Ryan.) For further answer these defendants states that lots 11, 14 and 15 of section 30, T. 97, R. 34, as shown by the Government survey made from the 2d to the 20th day of April, inclusive, for the year 1898, *is* swamp and overflowed lands and *was* included in the grant of September 28, 1850, to the State of Iowa, made by the Government of the United States wherein all the swamp and overflowed land in the State of Iowa was granted to the State of Iowa and said lots were included in the grant of the legislature of the State of Iowa wherein all swamp and overflowed land in Palo Alto county was granted to Palo Alto county. And that the defendant, W. L. Hemphill, has purchased from said county said lots, and has paid a part of the
9 purchase price therefor; that the legal title to said lots remain in the United States as patent has not yet issued; that the equitable title is in Palo Alto county subject to a contract of sale of defendant, Hemphill; that on the 30th day of August, 1898, said county by its duly authorized swamp land agent selected said lots as swamp and overflowed land and filed such selection in the United States land office at Des Moines, Iowa; that on the same day the plaintiff herein made application to enter said lot 14 as an adjoining farm homestead, his said application being filed in the United States land office at Des Moines, Iowa; that by order of the register and receiver of said land office a trial was had before said officers, of which the plaintiff herein had notice; that said officers rendered their joint decision, holding each of said lots to be swamp and overflowed land and approving the same to the State of Iowa and Palo Alto county; that said decision was forwarded to the Commissioner of the General Land Office on appeal of the plaintiff herein; that the Commissioner of the General Land Office affirmed the decision of the register and receiver; that thereafter the Secretary of the Interior affirmed the decision of the Commissioner and has approved each of said lots for patent; that there only remains the ministerial act of preparing and executing the patent from the Government of the United States to the State of Iowa and from the State of Iowa to Palo Alto county to establish the legal title in said county. These defendants deny that this court has jurisdiction over the subject matter of this suit. Wherefore, the defendants pray that the petition of the plaintiff be dismissed and judgment rendered against the plaintiff for costs and for general relief.

On the 11th day of April, 1900, the plaintiff filed the following

Reply.

Plaintiff for reply to the answer of Richard T. Ryan de-
10 nies every allegation not otherwise admitted or plead to.
Plaintiff denies that defendant went into possession of a portion of the land on or about August, 1898, and has resided thereon since said time; he denies that land upon which defendant resides is a part of the land claimed in this action by the plaintiff; he admits that he made application to enter a portion of this land as stated; that said application was made under advice of counsel that it would not waive or bar his title obtained by him thereon if he obtained the same by virtue of the patent issued to said Anthony through whom he claims title, and that it would be cheaper to obtain the claimed outstanding title by entry. That all of the proceedings with reference to the resurvey of the land and opening the same for homestead was without authority or jurisdiction for the reason that prior theretofore the United States had caused section 30 to be surveyed and platted and thereafter sold and conveyed said land according to the official plat to John A. Anthony; that by said patent the United States parted with all its title to the land in controversy herein.

On the 11th day of April, 1900, W. L. Hemphill filed the following amendment to his

Answer.

That prior to the 29th day of April, 1900, the plaintiff had fenced n and was in possession of the land described in the petition outside of the meander line, and had thereon a fence; that the defendants, Hemphill and Ryan, were claiming said land and the possession and ownership thereof as set out in their answers; that the plaintiff and this defendant had entered into an oral agreement whereby for the consideration of $25 then paid by the defendant to the plaintiff the plaintiff sold to this defendant said fences and relinquished to
the defendant said land and all claims and demands of the
11 plaintiff thereto, and thereupon the plaintiff executed to this
defendant a written contract and receipt in words and figures as follows, to-wit:

"RUTHVEN, IOWA, 4–29, 1899.

"I hereby sell all my interest in the following fences on the section line between sections 29 and 30 of two wires on what borders up to Crookshank's. One on or near the county line of about 80 rods and one starting on or near the half section line on the west side of section 30, and running in an irregular line to southwest corner of lot 4, section 30, of two wires. And a three wire fence running from southwest corner of lot 4 to half section corner on east

line of section 30 to the said W. L. Hemphill, all being in township 97–34 and 97–35, for the sum of $25.00 in hand paid by the said Hemphill for possession of land and fences.

"GEORGE SCHLOSSER."

That thereafter the plaintiff and this defendant entered into further oral agreement that the parties should have Leroy Grout, county surveyor of Palo Alto county, run a boundary line between the land of the plaintiff and of the defendants in accordance with the meander line of the original Government survey, and that said line should be the boundary line between the land of the plaintiff and these defendants, and that division fence should be built upon the same; plaintiff should build half and the defendants half of said fence; that thereafter the said parties did procure said Grout to run said line, and thereafter these defendants built their half of said fence and the plaintiff built a portion of his half of said fence and the parties thereafter occupied their respective premises and by reason of said agreement the meander line and the fence thereon has become and is the boundary and division line between the lands of the parties hereto.

12 On the 11th day of April, 1900, the defendant, Richard Ryan, filed the following

Amendment to His Answer.

Richard Ryan amending his answer makes a part hereof all the allegations of paragraph 12 of the amendment to the answer of W. L. Hemphill, and further shows that the land of this defendant, Richard Ryan, lies between the land of the defendant, Hemphill, in said amendment referred to. Further answering the defendant says that under and by virtue of the laws of the United States the defendants herein are the owners of the land in controversy herein; that defendants claim the ownership and possession of said lands by virtue of the acts of Congress; that prior to the several acts of the Land Department of the United States in the answer of the defendants referred to, said lands were public lands of the United States; that the State of Iowa and the courts and laws of Iowa had no authority or jurisdiction there over; that only the courts of the United States and the Land Department thereof have any jurisdiction of this controversy.

On the 11th day of April, 1900, the plaintiff by way of reply to the answer and amendment thereto of Palo Alto county and W. L. Hemphill, filed the following

Reply.

"Division 1. Plaintiff denies each and every allegation in said answer and amendment except admitted or plead to. With the explanations in this reply hereinafter stated, plaintiff admits that on

the 30th day of August, 1898, he filed application in the United States land office at Des Moines, Iowa, to enter lot 14; that a trial was ordered by the register and receiver and had before said officers
to determine the swampy or-on-swampy character of said lot;
13 that at said trial the plaintiff appeared with cou-sel; that the register and receiver rendered their joint decision, holding said lot as swamp land and approved the application of the State of Iowa and Palo Alto county; that the plaintiff appealed; that the Commissioner of the General Land Office affirmed the decision of the register and receiver; that the Secretary of the Interior approved the decision of the Commissioner, and approved said lot for patent; that there only remains the ministerial act of preparing and executing a patent from the United States to the State of Iowa and from the State of Iowa to Palo Alto county, conveying the legal title to the county. Plaintiff admits that on the 29th day of April, 1899, he entered into an oral contract with W. L. Hemphill for the sale of a fence; that said fence was not located on the south half of section 30. Plaintiff specially denies that there was any contract with reference to the possession of any part of the land in controversy; that he signed or executed the receipt set out in said answer, but avers that he did sign a receipt for $25 for the purchase price of the fence; that if said paper set out bears the true signature of the plaintiff the last six words, to-wit: (for possession of land and fence) *was* inserted therein after the same had been signed and without plaintiff's knowledge and consent; that the instrument as it now appears is not the instrument signed by plaintiff. Plaintiff denies each and every allegation except the oral agreement of the boundary lines, except he admits he had a conversation with said defendant with reference to ascertaining the lines of the Barber survey, and did agree if the defendant would employ Grout to run said lines, and if it was determined plaintiff's line did not exist further than the lines so surveyed by Barber he would pay half the expenses of said survey.

Division 2. As to the acts and proceedings in the Land De-
14 partment of the United States plaintiff replies the same as in his reply to the answer of Richard Ryan."

On the 15th day of May, 1900, the defendants, W. L. Hemphill and Palo Alto County, filed the following supplemental

Answer.

Pursuant to the resurvey of the lands described in the petition and in pursuance of the laws of Congress of the United States a patent for lots 11–14 and 15, in section 30, township 97, range 34, was on the 18th day of April, 1900, duly executed and issued by the United States of America to the State of Iowa under and by virtue of an act of Congress of September 28, 1850, granting swamp and overflowed lands to the State of Iowa and from the State of

Iowa to Palo Alto — day of April, 1900, execute and issue to the county of Palo Alto a patent for said lots; that prior to the commencement of this action and ever since the defendant, Hemphill, has been in possession of said premises.

On the 22d day of May, 1900, plaintiff filed the following

Reply.

That the title and interest which the defendants claim to the alleged lots is barred in that the plaintiff and those under whom he claims title have been in open, notorious and adverse possession of said land more than ten years prior to the commencement of this action and ten years before defendants asserted any claim of title thereto, and that said possession has been continuous; that the defendants made no effort to assert title thereto and are barred by the statute of limitation.

On the 11th day of April, 1900, the case came on for trial before the court, and the following proceedings were had:

15 *Plaintiff's Evidence.*

GEORGE SCHLOSSER.

My name is George Schlosser. I was born in 1857. Am a farmer and live on the south half of section 30, township 97, range 34; am the *the* plaintiff in this case.

Plaintiff offers the following exhibits, and it was agreed that the same should be received with the same force and effect as though the original of said exhibits had been offered:

EXHIBIT "A."

Being certified copy of patent issued by the United States to John A. Anthony for lots No. 2 and 3, section 30, T. 97, R. 34, containing 99.80 acres, dated October 10, 1874.

EXHIBIT "B."

Being a warranty deed dated June 27, 1884 signed John A. Anthony and wife, conveys the same Exhibit "A" to William H. Given.

EXHIBIT "C."

Certified copy of warranty deed of William H. Given, unmarried, to Frank L. Given, conveying the same as Exhibit "A," executed May 25, 1885.

EXHIBIT "D."

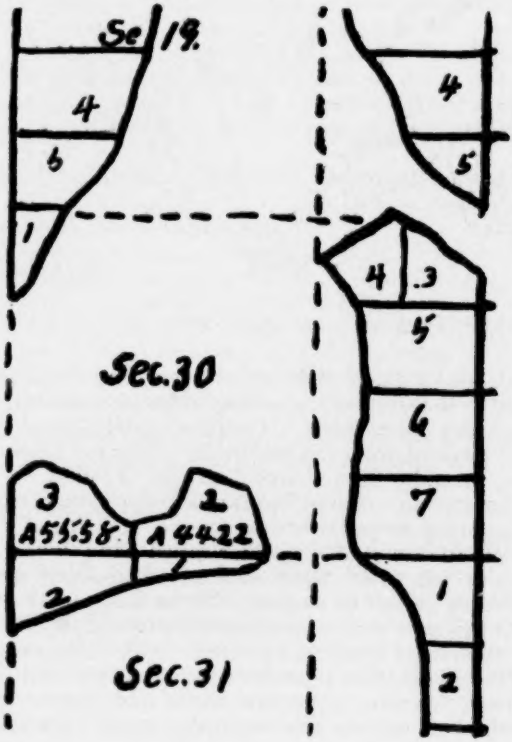
Certified copy of warranty deed signed Frank L. Given and wife, conveying to George Schlosser the land conveyed in Exhibit "A," executed March 17, 1892.

The defendants object to Exhibits "A" to "D," inclusive, as irrelevant, immaterial, incompetent, as they do not show or tend to show title to the land in controversy.

Plaintiff offers in evidence Exhibit "E," being certified copy of the platting of the original survey of township 97, range 34, certified by the secretary of state; also Exhibit "F," certified copy of official plats of same land, certified by the Commissioner of the General Land Office.

Defendants object to Exhibits "E" and "F" as incompetent and immaterial and not showing or tending to show title to the land in controversy.

EXHIBITS "E" AND "F."



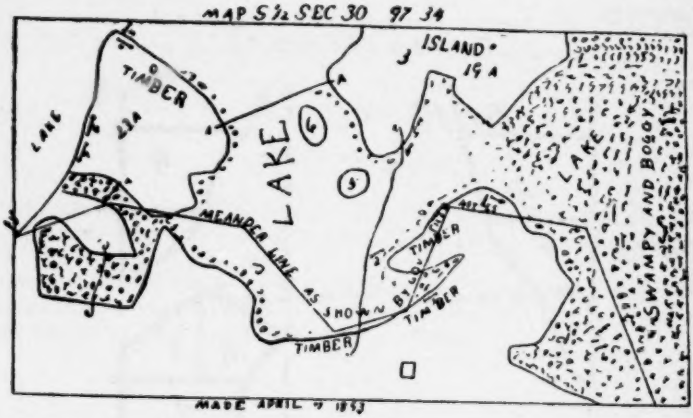
LEROY GROUT.

My name is Leroy Grout, age 60 years, residence Emmetsburg, Iowa, civil engineer and county surveyor for 26 years of
17 Palo Alto county, Iowa. In April, 1893, I made a survey of the south half of section 30, township 97, range 34, and made a plat of the survey. Exhibit "G" is that plat. It is a correct and accurate plat of the south half of section 30, and shows the high lands and meander lines and section lines and half section lines.

Plaintiff offered in evidence Exhibit "G."

Defendants object to the same as being incompetent and immaterial.

EXHIBIT "G."



I had the Government field notes when I made the survey. It was impossible to trace out the south half of the section and meander of lots 2 and 3 accurately. I approximately found the location of the meander lines from the field notes. The red lines is supposed to show the meander line of lots 2 and 3. I found the southwest corner of the section. There was no meander corner visible. I located a temporary meander corner on the west line of this section. It is right on the shore of the water called Mud lake. There was more or less water there, as the ice had about gone out. It
18 was slush ice on the surface. There was a bank of earth and rocks the same as are found on the shore of most all our lakes. The white portion of this plat represents land not covered by water or bog. The blue portion represents lake and bog, that is water and bog; the dotted portion represents water and grass. The eastern portion of the half section was wet, boggy land. We could not get

across at that time. The portion north of the line marked in red ink indicating the m-ander line, the white irregular point, is practically covered with timber and brush. At that time this was surrounded on the east, north and west by slush and water.

Q. And what was the character; was there any shore line there or was there simply a gradual decline on the east and north and west of that point?

A. On the east it was not so well defined all around if I can remember. On the east shore was low and willows and marsh grass on the shore. Upon the extreme north side it was somewhat higher; what we call an island covered with hazel brush and other growth. This point was mostly surrounded by water and marsh land. I was not familiar with Mud lake prior to 1888, have been there frequently since that time. I was there in 1891 and 1892, a comparatively dry season. Since then there has been a greater rainfall. I could hardly state intelligently about the body of water, it was about one-half mile across. I have drawn on the plat a square to indicate where Schlosser's house is located; I cannot say that that is the exact location. The land immediately north and west of this point is marshy and boggy and both times I was there it was covered more or less with water. East the land is boggy, and in a wet season is difficult to get over. Lost Island lake is south of this 20 or 30 rods.

I made no observation as to whether or not at one time Mud
19 lake was connected with Lost Island lake only from the field notes. A sand bank separates them and has ever since I first saw it.

Q. Is there apparently a connection between the two lakes, that is, is there an outlet running down toward Lost island at the ex-extreme southeast corner of this section?

A. There is not any regular connection that I have noticed. The land is somewhat lower near the eastern side. There are about 23 acres in this point on the northwest corner of the south half. There are about 19 acres of dry land in the island. I have been in this county 26 years and am quite familiar with the lakes. I first noticed Lost Island lake and lakes in that vicinity in 1876. I think the water has been receding since that time in all the lakes.

Defendant moves to exclude the answer of the witness as being immaterial and not applying to the land in controversy.

Cross-examination:

I did not notice any bogs or reeds growing in that portion of the land where dots do not appear. I made the survey in April. It was more than an ordinary wet spring. I would not say whether the boggy land could be artificially drained and suited for agricultural purposes. I think it would be difficult matter to drain Lost Island lake. The bogs are not of a sandy character, more mud and soil. I was on the land and made a survey for Hemphill in May a year ago. There was more water then than when I made the first

survey. There had been considerable more rain last spring than for several years.

Q. In your opinion was the water there of a surface character?

A. I presume that it was like it is all over these lakes, nearly every one of them have been dry for the last few years. Lost Island lake proper was never dry.

20 Q. You would not call Mud lake a permanent body of water as compared to that of Lost Island lake.

A. No. Lost Island lake is a great deal deeper and more well defined and well formed lake.

M. S. GREENE.

I am 50 years old. Reside in Spencer, Iowa. Came to Clay county in 1871. I own some land on Lost Island lake. Have known Mud lake since 1871. I know where Schlosser's home is located. I was recently on lot 2 and 3 in section 30, had plat Exhibit "G" with me at the time. Took photographs of the land. Photograph Exhibit "H" was taken with the camera standing at the place marked No. 1, on the plat and shows the shore line running southeast. Photograph Exhibit "I" was taken with the camera at the point marked No. 2 and shows the shore line northeast or the division line between the low land and the high land. Photograph Exhibit "J" was taken at a point marked on the plat No. 3, and shows the shore line running southwest. I put a handkerchief close to the meander corner, it shows on the photograph and is directly north of Mr. Schlosser's house. Photograph Exhibit "K" was taken at a point marked on the plat No. 4, with the camera focused southeast and correctly shows the shore line. Exhibit "L" is a photograph taken at a point marked No. 5, with the camera looking north across the lake and marsh. Exhibit "M" was taken at a point marked No. 6, with the camera directed north and shows the shore line. Exhibit "N" was taken at a point marked No. 7, was taken at the same place as Exhibit "M" with the camera pointed in the direction of the arrow at No. 7, and correctly shows the shore line.

Exhibit "O" was taken with the camera directed directly
21 northeast at the arrow No. 8, on the plat looking across the lake northwest. The men were in the boat at that time.

Plaintiff offers in evidence Exhibits "H" to "O" inclusive.

Objected to as not having been properly identified and irrelevant and immaterial.

The soil between the trees and water as shown by Exhibit "M" is stone and gravel, no vegetation; as shown by Exhibit "N" it is not so stony or gravelly. As shown by Exhibit "J" it is a dark muck of land. There is a very good bank I think. In 1893, I was on Mud lake in a boat. Northwest of Nos. 5 and 4 arrows on Exhibit "G" is open water which has the appearance of shallow lake.

Have seen the lake two feet higher than it is now; that was in 1878. There was no reeds and rushes in the lake proper at that time. I think it extends north something over a mile, northeast and northwest and from a half to three-quarters of a mile wide. The land immediately north of Schlosser's place, north and west of arrow "three" is boggy wet land, more or less grass and rushes. It was covered with water in 1878. At that time there was no rushes in the center; there were around the edges. The land on the east of this half section 30, is boggy, wet land; some water standing there. The grass hid the view of the water.

Q. Have you ever made any observation as to whether or not Lost Island and Mud lakes have been connected at one time?

Defendant objects as incompetent, and immaterial and calling for a conclusion and opinion.

A. I should say they had been connected at one time.

Defendant moves to strike out as a mere opinion and conclusion.

There is a sand bank between Lost Island and Mud lakes, 22 I suppose 40 rods wide between water. I think the time was when there was no water there. There is a highway along the bank. I have been over it in early times.

Q. Has the water in Lost Island lake receded from that bank since you went across there first?

A. Not much.

Q. Has the water in Lost Island lake receded from where its stage was when you first saw it?

A. I should think three feet or so. I think it commenced to fall in 1887. Would recede one year and the next would raise some.

I am acquainted with Trumbul lake and all the lakes in that locality. I know that Trumbul lake has been dry in the last six or seven years. Until that time it looked to me like quite a deep lake.

Defendant moves to exclude the answer as being a conclusion, incompetent and immaterial.

They run a sail boat on Trumbul lake, I think, in 1874. It has well defined banks. The roots of the trees, as shown by Exhibit "M," are exposed on the side next to the water.

Cross-examination:

These photographs were taken last Sunday. The numbers and arrows one to eight have been placed on the plat since. There was a cross made by Mr. Schlosser when we took the pictures. I was told that this plat was a portion of section 30, township 97, range 34. There had been a snow a week or two before the photographs were taken and it had all melted away. There is a great deal of land in the vicinity of this land that will be covered with water after much

of a rain or much of a snowfall. Trumbul lake is larger and covers a good deal more surface than Mud lake and is a deeper lake.

23 About five or six years ago Mud lake was entirely dry. Trumbul lake is in Clay county about a mile and a half from Mud lake. The outlet of Mud lake is into Trumbul lake. Trumbul lake drains into the Sioux river. Round lake is just south of Trumbul lake and drains into the Sioux. I always thought Trumbul lake drained into Round lake and from there into the Sioux. Round lake has been dry one season to my knowledge. I think five years ago Mud lake was cropped. Lost Island lake is the most permanent body of water in that country. I never seen a connection between Lost Island and Mud lakes. I first saw the lakes in 1871. There has been no connection since that time. The old stage road was established along the beach before I saw it. It is simply my opinion that there has been a connection between them. The land in Mud lake is more or less mud. I own land in section 1, township 96, range 35, bordering on the original meander line of Lost Island lake. There is some dry land between the meander line and the lake. James Valley built a shanty there. He and John McClellen made application for a resurvey. I resisted the application. I have a case now pending against Mr. Valley.

JAMES SPAULDING.

I am 60 years old, live one and one-half miles east of Schlosser since 1872. Have seen Mud lake frequently, crossed it on the ice. Was a sheet of water when I came there in 1872 a mile and a half long and sixty rods wide. Water was two feet higher then than now. Same stage of water kept up pretty well until five or six years ago. There was pond lilies and rice pretty generally growing over the lake. Have caught fish there myself. Have seen the water wash up to the trees along the point that projects into the lake two or three times. I found water north of Schlos-er's house. I attempted

24 to go from there with my team; it was frozen over and I got my horses in. Never could get over on the island until the last five or six years. Would have to get timber from over there when it was frozen up. In late years there have been some seasons when you could drive a team across. During the early years Lost Island lake was about three feet higher than it is now. I know where the old Palo Alto county road passes north of Lost Island lake. The road runs close to the side of the marsh. The ridge is three or four feet high and ten rods wide. It is sandy. There are willow trees, box elders and choke cherries part of the way.

Q. Are there any trees right opposite the narrowest point of the road between Lost Island and Mud lakes on the embankment?

A. There are some cotton wood along there; they were quite large when I came there.

It had the appearance of the lakes being connected at some time.

Defendant moves to strike the answer out as a conclusion.

The character of the dividing line around the island between the marsh and water and the high land is quite high. Some of it is a gradual incline opposite Schlosser's house about six feet above the high water. There was large trees growing on the island when I first saw it from a foot to two feet through. The marsh land on the east half of this half section was not farmed or pastured in an early time. It has been pastured in the last five or six years. It was grass and wet a portion of the years. I have seen a body of water completely cover it.

Plaintiff offers in evidence from the Government field notes on file in the office of the county auditor so far as the same related to a sub-division of township 97, range 34, on page 300, of said
25 record, concluding on page 317; also on page 321 to 399 inclusive, a certificate of the register appearing on page 400 and of the auditor appearing on page 401.

Defendant objects to the record as being incompetent, irrelevant and immaterial, and for the further reason that the field notes, so far as the meandering of an alleged body of water on sections 19, 20, 29 and 30, township 97, range 34, *are* concerned, they have been held to be incorrect and have been corrected by direction of the Secretary of the Interior, and a new survey of said section has been made by the United States, and the field notes introduced are not now recognized by the United States, the State of Iowa or Palo Alto county.

JAMES SPAULDING—Continued.

I saw water lilies during the earlier years on the east end of the body of water. They were growing there in the summer. Have seen them grow in shallow and deep water.

Cross-examination:

During the time I have lived there the water has varied; some years higher, some lower. The marshes some years have dried up; other times have been full. The year 1871 was rather dry. I don't think section 30 was dried up. I did not discover it dry in earlier years. The water that goes over section 30 starts on section 36 in Clay county on the south and runs into about forty yards of the east section line in section 30 in Palo Alto county. I don't call this lake along the east side of section 30 on map Exhibit "G." It has always had grass on it ever since I lived there, except one place right east of the island; there is a pond there. I don't remember of any place south of the island in which there has not been grass growing
26 during all the years from Mr. Schlosser's lots across the island. The land south of the island has been pastured about ten years. I have seen wild rice and grass west of the island, in the

earlier years it was weeds and rice. Never saw grass growing prior to ten years ago southwest of the island. Saw standing water there every year. I presume that portion southwest of the island would be called marshy or swamp. The lake puts in between the island and this timber point. Have seen part of that which I call lake dry six or seven years ago. The land was not dry between 1871 and 1890 to my knowledge.

Q. Now, what is called the lake proper, as a matter of fact, is on the north half of section 30, is it not?

A. Yes, sir. If that plat is correct the lake proper comes down on the south half of section 30 between the island and timber point. The lake proper does not surround the island. It only comes along the north and part of the west portion of the island. I don't think any of the island reaches the land. There is a marsh between the lake and island all around, without it is on the west side. The marsh is not very wide at the west point of the island; toward the east it is wider; might be ten rods. There is a difference in recent years in the condition of the land. The water has varied up and down, but not as high as it used to be. In the summer time the marshes have gone dry. That has been generally true all the years I have been there, with the exception of a year or two. I know of fish running up into the sloughs and marshes up there. I have seen grass growing up north and west of the island not very far from the island. Never seen grass grow all the way across until the last few years.

Q. Do you remember testifying in the case of Geo. Schlosser vs. Wallace Crookshank in November, 1893, in this court?

27 A. No, sir, I was not on that case at all. I don't remember giving testimony in this court concerning this land. I don't remember testifying in 1893 that several years before that I had seen a portion of Mud lake dry. I don't now remember that several years before 1893 I saw a portion of Mud lake dry. Three years is the extent it has been dry since I was there and that was five or six years ago. I think I did not say in 1893 that the lake was so dry that the stock had food there.

Q. Were you asked in that case this question: "Q. This mark in the center of the lake, is not that dry now?" "A. Dry enough so stock has food there in season."

A. I think that is a put up job. I think I did not testify to that. If that is the case I have forgotten it. I don't say that I did not, but I don't remember. There is no other James Spaulding that I know of.

Q. And were you asked by Mr. Cory the question, "It dries up and fills up just the same?" and you answered, "Yes, sir."

A. I do not remember.

Q. Do you remember testifying in that trial that you traveled over it in 1871 and 1872, and that you traveled over the dry parts of it at that time?

A. I do not think I testified any such thing. I did not travel over the dry part in 1871 and 1872.

Q. Were you also asked, "Have you seen any change in this tract of land from the time you first saw it up to this time?" and you answered, "Nothing more than it seems that the country is getting dryer than it used to be."

A. That might be the case; I do not remember.

The fact is the only change I have seen there is the country in general is getting dryer. Cultivation of the soil and break-
28 ing it up absorbs moisture. There was some very dry seasons. It might be I traveled over a portion of the lake in the early 70's. I do not remember of any change up to 1893 only the lowering and rising of the water. When I first came there I think there was a fence on the southwest of the lake. They used the lake on the north part of section 30 on the fence. The south half of the lake land of section 30 on the west end was used for pasture. The part of the plat marked lake southwest of the island was used as pasture in 1871. I was a witness in the case of The Chicago, Milwaukee & St. Paul Railroad Company *vs.* Palo Alto County, tried at the United States land office at Des Moines, Iowa, in December, 1898.

Q. Do you remember of testifying in that case that these lots marked on plat Exhibit "2" in section 29, as 12, 13, 14 and 15, were dry and always had been?

Plaintiff objects as not proper cross-examination.

A. I think my answer was a portion of them were dry; about one-half.

When Hemphill settled up there on that land on the north part of section 30 I had some of section 30 in pasture.

Q. And you and he had some disagreement over that, didn't you?

A. I don't know how anybody could avoid having disagreement with him.

Q. You have had more or less disagreement with Hemphill during the years he has been there?

A. Why, he wants to blow at me occasionally. I keep away from him all I can. Have no dealings and never expect to have. Our relations have been and are unpleasant.

Redirect examination:

The fact is he has kept the neighborhood in an uproar ever since he landed in that country, trying to snoop around
29 and get all the land he could from his neighbors. He is the chief of squatters up there. I have been told where the northeast corner of section 30 is. Do not know that I have ever been to it. My pasture was on the north half of section 30. There was water standing frequently on the east portion of the half sec-

tion. I have seen it covered with water continuously where it is marked in blue, sometimes in the summer and sometimes in the spring. I have seen the southeast corner of the section. There are springs in the lake. One near the east end of the south side out beyond section 30. One on section 20 near Lee Hemphill's. One on section 29 near Alex. Hemphill's. One out in the lake, where Schlosser piped from when the lake was dry. He had a tank there, on the west side. The outlet of the spring is in the lake.

Recross-examination:

The tank is in Clay county west and a little south of the point. I knew the lake went dry sometime years ago, but did not know which part dried up last. The water was not running from the spring at the time I was there. There was water running along the ground from the spring. I knew of Crookshank having a well down in the marsh east of the island; I think on section 29. I remember talking to the county auditor of this county shortly after Mr. Hemphill claimed to have bought the land in section 30. I do not remember whether I told him the land was worth more than Hemphill paid.

Q. Do you deny, Mr. Spaulding, that you said that all that land through there was worth $20 per acre.

A. I do not remember. Hardly think I did.

FRANCIS FITZGERALD.

Am 63 years old. I live twenty rods west of Mud lake in Clay county, one mile and a half from Schlosser. Came to Clay county in 1871. Have been on section 30 occasionally. Know the character of the land. Have been on the point of timber frequently. Have examined the shore line on the west side. Raises abruptly from the water. I think slants slightly; gradual slope. Quite a number of trees along the bank six to twelve inches in diameter. They are four or five rods back from the water now. The beach between the water and trees is gravelly close to the bank. Further out it gets muddier. The roots of the trees along the shore line are exposed, I presume by the washing of the water against them. I have seen the water up against them. Not in late years. The land or water that lies between the land and Schlosser's land in an early day could not be crossed over while there was water there. Not a clear body of water; kind of slough. The grass projected up in places. I went over there in the winter of 1872 to get wood; bought it from Anthony.

Objected to as immaterial.

The land was covered with timber in an early day. The land on the east of the plat marked lake was covered with water in an early day. Of late years it is a good deal dryer. I have never been on it. Coarse cane brake was growing up in it.

Q. Did the water in it seem to be continuous or not, that is, was it a clear sheet of water or was there grass growing up in it, grass and cane brake mixed.

A. I think so, more cane brake than anything else.

Cattle were not pastured there in early days. In former years the lake northwest of the timber point was a clear body of water. I did not see grass or water lilies growing there in the early days. At the present time it is all marsh and bogs, miscellaneous mixed up stuff. That is true of the entire body of water. Wild rice
31. growing there. The depth of the water varies at different times of the year. I think it has been four or five feet in early days. This mud you could hardly measure or call it water. I have never measured it. Fish live in the lake, pickerel and buffalo.

Cross-examination:

I live either on the outlet or inlet of Mud lake, I do not know. Mud lake drains into Trumbul lake, Trumbul lake into Swan lake. Mud lake has well defined banks along the west and south part in Clay county and in Palo Alto county about a mile. Have seen weeds, rushes and grass growing through the water all over. I have seen mighty variations; it has changed with the seasons, wet and dry.

Q. And some years in earlier years you saw a large part of Mud lake dry, did you not?

A. I have, totally dry there seven years ago.

In earlier years I never saw it nearly dry. It was dryer some years than others. Part of it might have been dry nine years ago. I cannot say as to whether there is well defined shore over at the island or not. I do not know whether there ever was a time when the weeds and grass did not come through in the fall. I think there was a few years when it was very wet in the fall, when grass did not make its appearance. It might have been fifteen years ago.

Q. And before that time every fall, as a rule, the roots and grass and cane came up through the water, did they not?

A. Occasionally, with this exception, there was some very wet years.

Q. Was not that true with reference to the greater part of Mud lake?

A. It would vary; the north part was more grass; the lower land was further south.

Q. Take the lake as a whole in the latter part of the season
32 the greater part would be covered with canes, rushes and grass?

A. Part of it; I could not say how much.

Q. North of Schlos-er's land?

A. Well, yes, but that was the highest part of the south end; more lower land in the north.

The greater part of the water of Mud lake is in Palo Alto county.

The entire bed of Mud lake was dry up to seven or eight years ago. They tried to put flax in there, but it was drowned out. I testified in the case of Grant and Eaton *vs.* Hemphill in 1891.

Q. Do you remember, Mr. Fitzgerald, in that case being asked this question: "Now, has Mud lake any defined shore," and you answered: "No, sir." Do you remember that?

A. If I was asked in regard to the north part I might have made that answer; otherwise I would have answered different. I do not remember perfectly. I made some answer, what I supposed was correct at that time. I think my recollection was better in 1891 than it is now.

Q. Isn't it true that the so-called shore or margin of Mud lake would vary from year to year and depend on the amount of water?

A. To a certain extent, yes, sir.

Mud lake looked like a good, clear lake when I first saw it. It turned out to be a marsh or pond.

Re-direct examination:

I think the lake is a mile and a half square at the present time. It has an outlet at high water. There are some springs. The principal one is in Clay county north of Schlosser's house. I don't know of any other.

33 NICHOLAS RICE.

I have resided on section 29, township 97, range 34, for sixteen years. Am familiar with Mud lake and the dry land on the south half of the section. I know where the meander lines are supposed to be. Am familiar with the point marked on plat Exhibit "G" as twenty-three acres and with the island. Have been over there frequently. In 1882 the water was pretty high. The fore part of the summer it was up in the trees; remained there until in August before it went down. It did not go down below the roots of the trees. It played along there until it froze up that year. From 1882 to 1890 it averaged along about a rod from the roots of the trees. The portion southwest of the island was generally covered with water up to seven or eight years ago. The eastern portion of the half section was generally covered with water in the spring, but receded toward fall. I did not know of it being pastured in earlier years, but has the last six or seven years been pastured by George Schlosser. The lake went dry one or two years five or six years ago. Had several dry seasons then. The water has been receding in the last six or seven years. The southeast of Mud lake has well defined banks. The north and northeast portion of the timber point of twenty-three acres on the west side of the half section is a well defined bank. North of Mr. Schlosser's house is a well defined bank. Mud lake proper extends down between the timber point and the island a

short distance. Does not go down to Schlosser's house. There is a sandy bar between figures 5 and 6 that is passable when the water is down to about two feet above the level south of it. I know where Lost Island lake is and the divide between Lost Island lake; should think it was ten or twelve rods wide. No sod there. Nothing but cockle burs. The soil is sandy now the same as when I first saw it. North of the sand bar is a boggy marsh. Lost
34 island is on the south. It extends about eighty rods along. From 1882 to 1890 the body of water which has been indicated as the lake proper was a nice clear lake. There was practically no weeds or grass in the center of the lake; a few patches around the edges.

Defendant moves to strike out the answer as a conclusion and incompetent.

I am familiar with the lake northeast of the 23 acres timber point. Exhibit "K" correctly represents the shore at that point. Exhibit "M" I should say, represents the shore line west of the point. Exhibit "N" represents the same point south, taking in a portion of the west shore. I fished in the lake 7 years ago. Caught buffalo when the lake was receding. Caught pickerel before that time. I was there last Sunday; there was plenty of water there west of the point. Came within a rod and a half of the shore line. The lake proper is a mile and a half long and three-fourths of a mile wide. There was timber along the south and east side of the banks. None on uthe north and west. The timber would average from a rod to 15 rods wide. Mostly cottonwood and ash. Trees 6 to 12 inches in diameter. The trees on the island were from half to two feet. John Anthony occupied it when I first knew it.

Q. Did you ever notice whether there was a depression of the lake or pond right here on this plat "G," to the extreme right side of the half section?

A. Yes, sir; there is.

Cross-examination:

I fished there in April, in August and one time when it was froze up.

Q. The fish came out from Trumbull lake into Mud lake at the inlet?

A. Well, not at that time.

35 Q. What time was that?

A. That has been about 10 years ago.

There is no fish in Mud lake now except what comes up in the spring during the high water. Mud lake drains into Trumbull lake and Trumbull lake into the Sioux river. The water in Lost Island lake is about 2 feet lower than when I first saw it. Mud lake dries up much quicker than Trumbull lake. I saw Mud lake entirely dry one season. The last portion of Mud lake that dries up is west

of the point of 23 acres timber or around on the south half of the section 30. The last 6 or 7 years there has been no water on the south half of section 30 in the fall or middle of the summer. In the spring it has been wet. It has been pastured in the summer and fall but when the snow goes off and the spring rains come there would be water there.

Q. Is not that true of the table land all over the northwest part of Iowa.

A. Yes, sir.

Q. And many places where there is no pretension of being a lake or pond in the spring of the year and when the heavy snows have melted and spring rains, there would be large sheets of surface water?

A. Yes, sir.

Q. And at such times as that there is water on the south half of section 30?

A. Yes, sir.

There never was water over the island. I should say there is 40 acres in the island that the water never covers. There is about 15 acres on the point as shown by Exhibit "G" that the water never covers. I don't know exactly where the half section line of section 30 running east and west is in relation to the island. The sand bank I testified to would be on the south half of section 30 to my judgment. I don't know whether Exhibit "O" shows the water in Clay county or not. If it was taken from the point where No. 8 and the arrow appears on the plat Exhibit "G," with the camera pointing in the direction the arrow points then the photograph would be the waters of the lake that is in Clay county. Photograph Exhibit "N" indicates the shore along the line or from near the line between Clay and Palo Alto county. The land lying between Lost Island lake and Mud lake is dry hilly land and quite a hill running each way into each lake. The sand bar is a short piece of land or road at the southeast corner of section 30. I know where Edward and William Beatty live and where Robert Beatty's shanty is and where the Hemphills live and that all that land was originally surveyed as being in Mud lake. The dry land was never in the lake, of course. All the land cultivated by these persons is dry land. In 1882 there was heavy rains in May and June. I have seen a plat like Exhibit "2" purporting to be the survey made by Mr. Barber in 1898. My house is situated on the southeast of the southeast of section 29, and I own lot 8 in section 29. Have had in possession for a number of years a portion of the land originally meandered as Mud lake, immediately north of lot 8 in section 29. I at-empted to enter that as an adjoining farm homestead and brought contest in the United States Land Office against the homestead entry of Alex. Hemphill for that land; the case is now pending in the United States Land Office. I had the Hemphills arrested for assault, tearing down fences and stealing corn. The fence and corn was on that portion of the Barber survey included in Alex.

Hemphill's homestead entry. I brought suit against them for $5,000 damages.

Re-direct examination:

There are three springs in the lake, one west of the point
37 near the line between Clay and Palo Alto counties, one on the southeast side of the lake close to the east end one near Lee Hemphill's residence. The water from this spring runs into the lake. The lake proper extends north and to the east of the island.

Objected to as calling for a conclusion.

East of the island is a boggy swamp connected with the lake proper.

Re-cross examination:

I don't mean to say that the springs are sufficient to keep the amount of water in the lake there is there. As the country around becomes cultivated and absorbs the moisture the lake dries up.

FRANCIS FITZGERALD, re-called.

I made a mistake when I said the greater part of Mud lake was in Palo Alto county. I think the greater part is in Clay county.

JOHN CROOKSHANK.

Age 69 years. Have known Mud lake since 1868, have been acquainted with it since that time and have seen it frequently. Did a little fishing there.

Q. What would you say was the appearance of Mud lake, at the time when you first saw it in 1868, that is to look out from say this timber point on the map here, Exhibit "G," on the northwest corner, now looking out across the lake from that point to the north and the northwest?

A. This looked like a lake of water, and in the summer time you would see lilies in it, and in the winter time there would be solid ice; the lilies seemed to die down or freeze up; in the spring of the year it was a big high lake.

I don't know how deep the water was where the lilies grew.
38 I live east of Schlosser's house half a mile. Have trapped and hunted along the lakes. I caught fish in Mud lake in the winter time, they got froze in the ice like and we grabbed them out with our hands. Once in the spring of the year I caught some pickerel around the point. The land on the south half of section 30, marked swamp on Exhibit "G" is marshy and boggy. When I first came stock would not run on that portion. The first time I knew cattle to go over on the island was 15 or 16 years ago. I had

to wade through the water to get them back. The land on the east when the water is high comes over it. When the water comes in it backs around, comes in between the island and timber point and backs east. The inlet comes in over section 32 close to the southeast corner of section 30, on the boggy land. Cattle can cross all over the land now. There was water all over the south and southwest of the island and between the island and Schlosser's land in 1868, when I first saw it. I think it was a part of Mud lake. It was connected with the upper part of the lake. There was no bar between the island and point at that time; it was all a clear body of water. Could not get from Schlosser's land across to the island in the summer time. I got wood off the island in 1870. Have set musk rat traps around the point of timber. From the point southeasterly to Schlosser's house was a well defined shore line. There is no well defined shore line where the check marks are, it is marshy, weeds and rushes.

Q. South of this body marked lake, lying between the island and Schlosser's land what is the character of the shore line where it is marked timber. Is it abrupt or gently sloping?

A. Well, pretty steep, a pretty steep bank along there.

At the point marked No. 1, where the arrow is it is sloping gradually. It is a well defined shore line north of the point
39 marked timber southwesterly along the lake, except there is gaps like through the bank and a low place along there. There is willow trees along the shore line. When the water is up it comes right up to them. The beach from the water line to the trees is gravelly. There is quite a little timber until you get down to the marsh like and then it gives out. I should judge the water was 1 or 2 feet lower now than when I saw it in 1868. Mud lake is about one and a half miles long and it might be 80 rods wide. There is a spring opposite the timber point, and there is a spring on the east half of section 30 and a few others around, I cannot locate them. There is some good farming land between Lost Island and Mud lakes. Mr. Schlosser's land is between them. At the southeast corner it has a sandy bank. The marsh I speak of is toward Mud lake from the division land. South is Lost Island lake. The bar is about 10 rods wide and 7 or 8 feet above the water's level. There is some difference between the lakes up there, some years one is higher, some years the other is highest; they have different inlets. Mud lake has been from 5 to 6 feet deep to dry. Five or 6 years ago it was dry and they sowed it to flax; the flax didn't grow to amount to anything. The soil where the flax was sowed was regular mud bottom. Mud lake was dried up for 2 or 3 years in dry seasons. It is wetter now, more water than there was then.

Cross-examination:

I know A. W. Barber, the deputy United States surveyor, who made the survey of 1898. I made affidavit for him as to what I

knew of the land. One summer all of Mud lake was dried up. The deepest part of Mud lake is along the county line. The deepest hole is in Clay county across the line, it is quite a considerable deeper than in section 30. The marsh or inlet lies up through the north half of section 30. About 30 acres of the island was never
40 under water and about 20 acres of the timber point; I am guessing at both of these.

Q. Now, in the time you have known it, Mr. Crookshank, the east half or the east 80 of the south half of section 30, how often has it dried up?

A. Why, more than half the time it would dry down during the summer.

Q. More than half the summers that portion of section 30 has dried up until it was marsh land and no water on it?

A. Yes, sir. There is no material difference between the east half of the south half of section 30 and the other portion of the south half of section 30; one dries up about as quick as the other. Those cattle crossed over to the island from section 29 on the north half of section 30; the sod seemed a little dryer or it was better sod. Before this was fenced 11 or 12 years ago we mowed grass on this marsh; it was hard work for the horses to travel because it would sink with them. We put up two stacks of hay.

It was about the center of section 30, some on the south and some on the north half of the section. That was 16 years ago; I am guessing at this now. I dug a well on section 29, about 10 rods from section 30, on the unsurveyed land down in the marsh part, it was about as low as the marshy part of section 30; I dug 8 feet to get the water. It furnished plenty of water, I used it until last year, dug it 8 or 10 years ago. I knew the land of the Hemphills and Beattys, it never was covered with water except there was a slough running down through Alex Hemphill's, a ravine, during high water it would overflow. I was a witness in the case of Schlosser *vs.* Crookshank and of Grant & Eaton *vs.* Hemphill. The testimony was taken in 1891, I think.

Q. I will ask you, Mr. Crookshank, if in the case last referred
41 to you were asked this question, referring to Mud lake: "You say it was pretty near dry last year." To which you made the following answer: "Yes, sir; the whole lake was dry last year, excepting a little piece, there was a few buffalo fish in it, and the lake dried up."

A. I remember that was the case of Mud lake one year. I have known it to be entirely dry at two different seasons.

Q. I will ask you if in the same case you were asked the following question: "Do you mean that the land could have been mowed and pastured in 1850? A. "I think it could, just the same as it can now, if it was a dry summer."

A. I do not remember, you know, but I presume that was all right. I think it could have been mowed and pastured in 1850 if it was a dry season.

There was some trees along the sand ridge on the southeast part of section 30 between Lost island and Mud lake, but they had been cut down along the edge of the sand ridge. There has been some big trees. I recall finding a section corner between the southeast corner of section 30 and the southwest corner of section 29 in connection with Mr. Barber. I first observed this stake in 1868, it was right opposite that portion of the ridge where there is no stumps or trees.

Q. I will ask you if in the affidavit that you made for Mr. Barber the following statement appeared, and if you made affidavit to the facts contained in this statement: "That the only lake here is Lost Island lake, which has a high, sandy, wooded ridge for its north bank, and that said ridge and bank are all south of the line between sections 19 and 30, and that on the north side of said bank is a grassy marsh, now dry, that I have seen that marsh covered with water only once the last 15 years, after a very rainy spell, and that the lake lands in section 30 are mostly of the same condition, except a tract further west known as Mud lake, which is all liable to become entirely dry every dry season?"

42 A. Yes, sir.

Mr. A. C. PARKER: I ask that the answer be stricken out as made before I could object, and I object to the question asked as not the best evidence, and as incompetent, irrelevant and immaterial and not cross examination.

Q. What would you say as to the facts stated in that question being true or not?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to, and as calling for a conclusion of the witness.

Q. The facts being the statement I have just read?

A. Yes, sir; that is right.

Q. The land described in that question is the land immediately north of this neck that you say, or sandy beach that is about 10 rods wide. Did you further state in the affidavit referred to, as follows: "I further depose that there is no channel, connection, or passage through the said ridge aforesaid by which water has appeared to ever pass—between the deep, permanent waters of Lost Island lake, and the grassy flats and shallow ponds north of the ridge, which were wrongfully mapped as a lake, and connected with the real lake, and that there was a stage road east and west on that ridge when I came here in 1868, where by the map it shows one continuous lake?"

The plaintiff objects to the question as being not the best evidence, and as not cross examination, and calling for the conclusion of the witness, and as incompetent and immaterial, and a statement of the conclusion of the witness.

Q. You so testified, did you, in the affidavit?
A. Yes, sir.
Q. And that statement is true is it?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to.

43 A. Yes, sir.
Q. I will ask you if in the same affidavit you made the following statement:
"I further depose that George Schlosser, who owns lots 2 and 3 in section 30, has and uses a large fenced pasture in the middle of section 30, and kept a large herd of stock there; that two or three years ago a dry season compelled him to drive his cattle daily across said lots 2 and 3, over to the large lake in section 31 to furnish them water, on account of the complete drying up for several weeks of the ponds or other bodies of water, which in wet seasons occupy a small part of said section 30?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to.

A. Yes, sir.
Q. And that statement is true, is it?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to.

Q. Yes, sir.
The banks around Mud lake are not so high as those around Lost Island lake. The land between section 19 and Lost Island lake is mostly marshy; what we call Mud lake is a little narrow lake.

Re-direct examination:

Mr. Barber and Ed Beatty were present when I made the affidavit for Mr. Barber. He wrote the affidavit. It was at my house. My family may have been present. I don't remember whether I read it before I signed it. There are some trees on this beach up near Lost island. The balance of the beach is sandy. The beach is about eighty rods long. The trees are on the north part of the strip, some on both ends. Mud lake has two inlets, one from
44 the north comes from the northwest, one from the southeast. The largest inlet is the northwest one. They drain, maybe, 5 or 6 sections, I don't really know how far north it does go. When my cattle went over on the island and I cut the grass it was pretty near a dry summer. They went in over north half of section. I don't know that the land could have been pastured and mowed in 1850, I only came here in 1868, was not in the country in 1850. The land from the south half of section 19 slopes down from the marsh a piece.

Q. Mr. Evans has referred to your testimony in the Grant case; I will ask you if this is not all your testimony on the subject matter to which he has referred:

"Q. What kind of land is that between the south line of section 19 and Lost Island lake? A. It slopes down to the marsh for a piece, then the lake is a long narrow lake; it is not such a lake as the Government has platted there by any means. Q. What kind of land is this down in here between the supposed south line of section 19 and the north bank of Lost Island lake? A. It is mostly marsh down around this Mud lake; what we call Mud lake is a little narrow lake. Q. You don't understand me, you know where the supposed south line of section 19 is? A. Yes, sir. Q. What kind of land is it immediately north of the bank of Mud lake, and immediately south of the south line of this supposed section 19? A. It is low land after you cross 19 down towards the lake. It runs down onto a flat lake until you get to Mud lake; there is a pasture there known as the Cameron pasture; there is a nice piece of dry land in there and some sloughs." Isn't that your entire testimony on the subject matter to which Mr. Evans referred in this question.

A. I think so.

Q. The person asking the questions, by mistake, used the
45 word Lost Island lake instead of the word Mud lake, did he not?

A. Yes, sir; that might be.

Recross examination:

The land now is dryer and solider than it was in 1868, cattle can travel over it; the banks are about the same; the sand ridge between the marsh and Lost Island lake is about two rods wider; I am guessing at that. Schlosser's land is northwest of the beach.

Redirect examination:

In my best judgment the bar lying between the swamp and Lost Island lake has been formed by the action of the ice for successive years.

Defendant moves to strike the answer out as being the conclusion of the witness, and as incompetent, irrelevant and immaterial.

JOSEPH HANSON.

I live in Clay county and have lived there since 1881. Have observed the lay of the land and the water in the south half of section 30, township 97, range 34, since 1881. It looked like a clear body of water at that time. In 1884 or 1885, I observed the shore line along the timber point, it was a well defined shore line. The water was pretty well up to the roots of the trees. It has receded from the

trees 12 or 14 feet. The beach is gravel-y and stony. Northeast of the timber point it is same. To the northwest the banks are a little more abrupt and higher. As you come down east of the tract it is inclined to be boggy and marshy. There was water between the timber and Schlosser's house, more than there now.

46 Cross examination:

Mr. Schlosser had a pasture on the south half of section 30 about 8 years ago. There was a large pasture there. Cameron had a pasture on the unsurveyed land, and Spaulding a pasture on the north side of Mud lake.

J. K. OLIVER.

I live in Clay county, have resided there since the fall of 1871. Live two miles from Mud lake. I got timber there in the winter of 1871 and 1872 from John Anthony. I don't know anything about the lines but I got it on what is known as the island, there was an impassable channel between his land and the island.

Q. How did you get on the land?

A. Well, to investigate before it froze up we got on the best we could without drowning, or getting in all over; it was very muddy but by a good deal of exertion we got a few light pieces of timber there. That was the first of November or last of October, it was the dryest year we had until 7 or 8 years ago. There was a sheet of water over west there. I called it a lake just the same as Elbow lake and Lost Island lake.

Defendant moves to strike out the answer as incompetent.

The banks around the timber point are well defined. Mr. Anthony kept the postoffice. It was pretty dry that fall and until the next year. About June we began to have the usual rains; I was surprised in looking over the ground to see so much more water than when I got the timber. When I came here, after 1872, we kept having a succession of rainy seasons and the water raised in Lost Island lake; that kept up seven or eight years; then the water in
47 Lost Island lake began to recede; that kept up two or three years; then it began to rain heavier than ever. The outlet was impassable for stock until seven or eight years ago; it has been constantly receding from that time up to the last two or three years; this fall they are higher than they was before.

Defendant moves to strike out the answer of the witness as conclusive and incompetent, not relating to the land in controversy.

Cross-examination:

In the fall of 1871 we got over to the island, got our timber and got out again. It was an awful job. That was before it froze up. I

own land on the meander line of Lost Island lake over on the other side of the lake. I have some of the unsurveyed land in my possession. I would not undertake to say how much or how little, whether there is one hundred acres or not; I don't hardly think there is 200 acres; I don't know how that is.

Objected to as not cross examination.

I have made no resistance to the application for survey. I was a witness in the case of Schlosser vs. Crookshank, tried in 1893.

Q. Did you say in that case when asked the following question: "Did you know that cattle could pasture on there? A. Why, yes, over where I went, that was in 1871, yes, sir. Q. And all over the east end of it? A. Over from Anthony's house to the place we went across to Lost island I should say that it could be pastured."

A. Why, I don't see how I came to say that because I never actually thought anything could get through in the summer season. I can't understand it; it seems strange to me; I don't know cattle had been kept there and why should I say it.

48 I testified in that case that I would not say how large the lake was, but that it was awful shallow. I did not know at that time that was all one lake; it was a mystery to me how much was Mud lake and how much another lake.

GEORGE SCHLOSSER, recalled.

I first visited the south half of section 30 in 1889, the spring of the year; I was hunting, found plenty of water for ducks right back of the house on the blue land, as represented by plat Exhibit G; out west and north was a clear body of water. There was a body of water there running nearly clear across the section. It covered over a half section. There was no weeds growing up in the water. Went on the water with a boat shooting ducks. The shore line around the timber point is well defined. The water backed up north of the house. I bought the land in 1892, lived on it two years before I bought it. The first year I fenced the timber and some of the southwest corner; built it out in the water some; that was in 1890. Waded out about three feet. In the spring of 1892 it got so dry you could walk across, as shown from A to A. Last year there was water all over the low piece here; the cattle nearly drowned. That portion of the land marked in blue on plat G had water all over it. It came right up to the roots of the trees. There is a spring up near the county line. It took 240 feet of inch piping to hold the water piped out to it to get the water to the shore. There is a vein of water comes out there as big as my arm. Before I put in my tank we had to run the cattle down to Lost Island lake to water them. After I got in a tank we watered 110 head of cattle there. The Beatty boys had two springs up on the north half of section 30. They could water 100 head of cattle during a dry year. The inlet comes in in a northeasterly direction. It draws from what we call

49 Twelve Mile lake; drains the whole country. Twelve Mile lake must be eight miles from Mud lake; has probably two

or three hundred acres in it. Mr. Given always talked to me as though he claimed all the land in the south half of the section. Claimed that all that land belonged to my lots 2 and 3.

Defendant moves to strike out the answer as immaterial and not proving title.

I treated it as mine up to the time these squatters commenced squatting on it.

Defendant moves to strike out the answer as immaterial and not proving title.

(Witness testified as to the photographs Exhibits G to O, inclusive, substantially the same as witness Greene.)

I never fished in Mud lake, but have caught fish when the water backed up right back of my house. There is a sort of raise right across from A to A. The ridge does not run quite across; there is a raise about half way or two-thirds until you strike a sand bar that raises out in the lake; seems to be a channel that raised up there. The lake extends around to the bar.

Cross-examination:

I moved on the land in 1890; used all the south half of section 30 outside of the water. The water backs over the rest of this that is marked blue on the plat Exhibit G. Whenever there comes a freshet in the spring of the year before the frost is out the water always comes out of the main lake and backs up over the bottom; that was the condition when Exhibit G was drawn. There was more water when Exhibit G was drawn than when the photographs were taken. Exhibit G was made in 1893. It was dryer in 1892. I crossed from A to A in 1892. In the latter part of the season of 1892 I pastured the land. I don't think the cattle went across from A to A in 1890, but they did in 1891. In 1892 they could get all over the entire half section, except what I had in flax. The places marked 5 and 6 are low places. They are the only pond holes on the south half section. I don't think the land around the places marked 5 and 6 could have been mowed in 1893. A man might walk through there, but it was soft. I saw a map something like plat Exhibit 2, the land marked on plat 2 as lot 15 is low boggy land. There was times since I lived there when the water was all over it; in the dry seasons it has been dry. I have pastured it every year.

Objected to as not proper cross examination.

The land on lot 11 is a little lower land, more wet than on lot 15. Never mowed either lot. It could have been mowed when the lake went dry. I should say two-thirds of lot 11 is covered with water now. There is not a great deal on lot 15, I don't think there is any.

Lot 11 did not dry up last year. Some years it has dried up. There is water on lot 15 in the little bog holes. I suppose it settled there from the melting of snow lately. Except the part of lot 12 designated as high and timber it is also covered with water at this time. I should think there would be twenty-five acres of lot 12 with water on it now, and over half of lot 13 is under water. If you went out to the half section corner of lot 14 you would have to go out in the lake. There is no water in 14 except what is in the lake. The old lake road went clear around the point. There is a part of the land that is within the meander line that is under the water, that is the east part of lot 3; must be three or four acres of it. All the land on lots 11, 12, 13, 14 and 15, except a little corner of the lake on 14, was pretty well dried up in 1892. Don't remember just how it was in 1893; it was entirely dry five or six years ago. It has not all been dry since. Last summer the water stood in sheets across
51 most of these lots. I don't remember how it was summer before last. I don't know for sure how many acres there are in lots 2 and 3, only what my tax receipts show. Taking the meander line as a boundary, there is only 99.80 acres in the two lots. I am claiming the whole half section on the strength of having 99.80 acres.

Plaintiff moves to strike out all evidence with reference to the map Exhibit 2 as incompetent, irrelevant and immaterial, no proper foundation has been laid and is not proper cross examination.

I am also claiming lots 7 and 8 in Clay county, as shown by plat Exhibit 2. On most of the half section last year Hemphill's cattle was in water up to their necks early in the season. I have drove a horse across the point marked B B and dragged posts across it. The signature to Exhibit 3 is in my handwriting, but there is some added below there that was not there when I signed it. The possession of the land was not there.

It is agreed that the court may consider as offered in evidence the rules and instructions of the Department of the Interior in existence at the time the General Government subdivision of the township in which the land in question is situated was made and the court may take judicial notice thereof.

Defendant's Testimony.

P. M. MOORE.

I am county surveyor of Clay county, Iowa, and have been for eight years. Am acquainted with the land in section 30, township 97, range 34. I have recently been surveying on the land; I made plat Exhibit 4, being a plat of the south part of the section. I had with me a plat of additional Government survey of this land. Ex-

hibit No. 2 is that plat. I took levels of the land in the south
52 half of section 30. I started from the water level of Lost Island lake, which is immediately south of section 30; I took the levels on the 30th of March and 6th day of April, 1900; on the 30th of March the ground was covered with snow; the figure 1 on plat 4 is the place from where I started to take levels; it is the water level of Lost Island lake. The figure 2 is on the ridge between Lost Island lake and the swamp land on the north; it is 7.70 feet above the level of Lost Island lake. The difference between the level of No. 1 or Lost Island lake and the land at the various numbers of the plat is as follows:

No. 3, 1.62 feet below the level of Lost Island lake.
No. 4, 15.63 feet above the water level.
No. 5, 2.52 feet above the level.
No. 6, 1.12 feet below the level of the water.
No. 7, 9.73 feet above the level of the water.
No. 8, 14.08 feet above the level of the water.
No. 9, 9.23 feet above the level of the water.
No. 10, is 12.58 above the level of the water.
No. 11, is 18.93 above the level of the water.
No. 12 is .77 below the level of the water.
No. 13 is 24.23 above the level of the water.
No. 14 is 19.23 above the level of the water.
No. 15 is 9.75 above the level of the water.
No. 16 is 3.90 above the level of the water.
No. 17 is .67 below the level of the water.
No. 18 is 11.95 above the level of the water.
No. 19 is 8.80 above the level of the water.
No. 20 is 4.35 above the level of the water.
No. 21 is 5.53 above the level of the water.
No. 22 is 1.70 above the level of the water.
No. 23 is .80 above the level of the water.
No. 24 is .60 below the level of the water.
No. 25 is 6.20 above the level of the water.
53 No. 26 is 5.68 above the level of the water.
No. 27 is the water level of the lake again.

The land I have marked swamp was covered with snow the first day I was there; the second day there was no snow, but there was water on it; the bogs and grass showed up through the water.

Q. Was that true generally all over the part that is marked swamp?

A. It is possible that there was a noticeable extent that there would be a wider space between the bogs than some other.

In the spring of 1894 or 1895, I surveyed Mud lake, in Clay county, mostly upon section 25; there was no water on the lake bed at all excepting at the spring near the range line of section 25. The spring is in Clay county; the piece of ground 4 or 5 rods around the spring that was wet would become dry in as dry a season as we had in 1894. Except that little spring the waters in that locality

are surface waters that come in from the surrounding country. The soil was black; it was dry then; it was not muddy; it was dry and dusty. The land outside of the dotted portion of the map is simply a continuation of the marsh off to the north and east, covered with this growth of marshy vegetation on the north half of section 30; the portions marked high land has not the appearance of ever having been covered with water in the history of man; anyway about 30 acres of the land has never been covered with water, and about all the land on the island could be successfully cultivated. The east side of the south half of section 30 is a continuation of the swampy, boggy tract. When I was there the second time it was immediately after the snow had melted away.

54 Cross-examination:

W. L. Hemphill and two other fellows that I did not know assisted me in making the survey; Hemphill carried the leveling rod and those two other gentlemen the tape. The leveling rod measures the altitudes; in this case the rod slides up, and when I give the signal he turned a thumb screw and fastens it and brings it to me so I could read it. It is possible that I could not tell whether the thumb screw had been moved an inch or two or a foot. Mr. Hemphill is one of the parties to this suit. To get the level I dug into the sand so that the water would be quiet and selected that place as a level. I had the level standing at a place nearly midway between numbers 3 and 1, and signalled the leveling rod to a position at a certain place in the road, and then I know that he raised the rod until I struck the level. I was standing at the instrument 25 rods west of Lost Island lake. The instrument was a surveyor's transit with a level constructed for taking levels. Hemphill was standing with the leveling rod at number 1 and then he went with the leveling rod to number 3.

Q. Do you know how far this was in the earth, this pole that he was holding there at 3?

A. Number 3?

Q. Three, yes, sir.

A. I told him to set it at the water.

Q. Do you know how far it was in the ground when you took that level?

A. In the ground?

Q. In the mud?

A. No.

55 Q. Do you know how far it was in the mud, or sand or water when you took the level looking off toward Lost Island lake?

A. I took some precaution there that I might be able to answer that question on cross-examination——

Q. I will ask you to answer it by yes or no.

A. How?

Q. I will ask you to answer that question by yes or no?
A. What was the question, please?
Q. Read it, Mr. Reporter?

Previous question read, as follows:

Q. Do you know how far it was in the mud, or sand or water when you took the level looking off toward Lost Island lake?
A. I don't think it was in the water at all because I observed the rod before he set it down and observed it afterwards on purpose to see whether he had stuck it into the water or not, and it had not been wet.

My instrument was standing up; I could turn it around without taking it up and resetting it and did so; Hemphill was about 10 rods from me at number 3; there was a sheet of water at number 3. Number 5 is a little bit under the water; number 3 is at the edge of the water. It is not a sheet of water without any intervention of bog or anything of the kind, still it connects around to Mud lake. The seasons had been dry for two or three years before the time I made the survey in section 25 in Clay county. I had only seen Mud lake once before; that was several years before. I could not say how large a body of water it was, it seemed to be a small lake. The water level at 22 is 1.07 feet lower than at 1, and 1.62 feet lower at 1 than at number 3; 1.07 at number 22 that makes a difference of 8–100; less than an inch, and may be accounted for in the position of the staff.

56 Q. Do you know how deep the water was in this lake there, Mud lake and the swamp that you made observation from to obtain the level between the two?

A. Why, I know the depth of it in some places. The day we drove over there from the east side of section 30 we drove with a sled, the snow was soft and the sled settled down between the bogs in some places.

Along the north bank of Lost Island lake there is a line of trees bordering on the lake, the washing of the roots of these trees could be done by water that was drove up by high waves much above the level.

Photograph Exhibit "M" looks like a lake shore; I found a similar condition around the north line of Lost Island lake.

Defendant objects as not cross-examination, calling for a conclusion and not the best evidence.

Re-direct examination:

Q. Mr. Moore, from the fact that the level on number 3 and on number 22 came so nearly corresponding, would you say that there was the evidence of the correctness of your reading the other levels that you took?
A. Why, I thought so, and I think so.

Q. If there had been a raising or lowering of the leveling rod at the points where you took levels, would or would it not have affected the actual level of the water on number 3 and number 22?

A. It would.

Re-cross examination:

I read number 22 and 27 from the same place and assumed that the water level of Lost Island lake at 27 was the same as number 1. The instrument was somewhere between 24 and 25.

57 Q. Did you take a level at the point of number 27 on Lost Island lake?

A. I read that, yes, sir.

Q. Now, as I understand the mat-er then, you had your level somewhere between 25 and 24, and from that point you took a level at Lost Island lake?

A. Yes, sir.

Q. Mr. Hemphill handling the leveling rod at both points?

A. Yes, sir.

Q. Then I understand you had your instrument where?

A. Between 2 and 3.

Q. Between 2 and 3, and did Mr. Hemphill handle the rod and you take a level at number 3 and at number 1, number 1 being on Lost Island lake and number 3 being the water on the swamp land?

A. Yes, sir.

Q. And that the two levels so taken come within 8–100 of being the same?

A. Yes, sir; that is my figures.

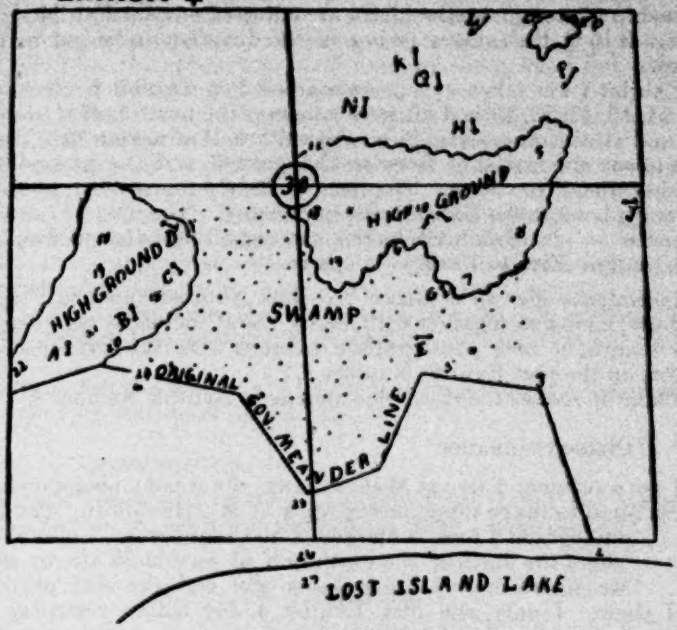
Q. Now, from that would you say that it would have been possible for there to have been any degree of changing of the thumb screw or whatever it was that indicated the lev-ling rod?

A. I think not, because I could have discovered it.

Defendant offers in evidence Exhibit 4, being the plat testified to by Surveyor Moore.

Objected to as incompetent, irrelevant and immaterial.

58 EXHIBIT 4.



J. W. WILCOX.

I am slightly acquainted with the south half of section 30, township 97, range 34. I know where the little house of Richard Ryan is situated. On the 30th and 31st of March, 1900, I took some photographic views of that land. The ground was covered with snow at that time. Mr. Moore, Mr. Hemphill and Mr. Ryan was with me at the time we took the levels. Exhibit 5 is a photograph of part of the land on the south half of section 30; it was taken at a point marked by the letter A on Exhibit No. 4; the camera was faced in the direction marked by the arrow close to the letter A.

Exhibit 6 is a photographic view of land in the south half of section 30, indicated on plat Exhibit 4 as letter B, with the camera facing north.

59 Exhibit 7 is a photograph of the land indicated on Exhibit 4 by the letter C.

Exhibit 8 is a photograph of the land indicated at a point marked D on Exhibit 4.

Exhibit 9 is a photograph of the land at a point marked on Exhibit 4 by the letter E, the camera facing northeast.

Exhibit 10 is a photograph of the land indicated in Exhibit 4 by the letter F, the camera facing as indicated by the arrow.

Exhibits 11 to 20 inclusive are photographic views of section 30, township 97, range 34, the places as indicated on plat Exhibit 4 by letters G to Q, the camera facing in the direction indicated by the arrow.

Exhibit 1 was taken at a point marked J on Exhibit 4. Exhibits 12, 14, 15, 17, 18, 19 and 20 were taken on the north half of section 30, and all the other exhibits on the south half of section 30. There was about six inches of snow on the ground and the ground was muddy under the snow. The land is clearly represented by these several photographs Exhibits One to Twenty. The letters I have referred to on plat Exhibit 4, have a corresponding letter on Exhibits One, and on Five to Twenty, inclusive.

Defendants offer in evidence Exhibits Number One and Five to Twenty, inclusive, together with letters A to P, inclusive, placed upon the margin of said photographic exhibits with the corresponding letters on the plat Exhibit Number 4.

Plaintiff makes the same objection as to Exhibit Number 4.

Cross-examination:

I am a printer; I live at Milford, Iowa; I am not a photographer; I was hired to make these photographs by Mr. Hemphill. The first photograph I took is marked A and number 5. I only know
60 where the lines of the south half of section 30 are by what Mr. Moore showed me and the plat and the blue print we had there. I only saw plat Exhibit 4 day before yesterday. I marked the plat Exhibit 4 the place I stood when these exhibits were taken. I marked them yesterday. I only know where the north half of section 30 is by that plat. I could not tell you where Exhibit 5 was taken without looking at the plat.

Q. Who assisted you in locating on this plat Exhibit 4 the places where you stood?

A. All the assistance I had Mr. Moore acquainted me with his different markings so I would know the different locations on the land; that was yesterday. There was nothing on the chart only the lay of the land as shown there. He simply give me the bearings of the chart. I took his word that the chart was a proof of the land and it is only from his statements that I could determine where we were.

The photographer at Ruthven developed these negatives; I simply took the snap shots and they were developed by him I made no memorandum as to where I stood when they were taken; just put the letters on the plat from memory.

P. M. MOORE, recalled.

Mr. Wilcox, the last witness, was out on the land handling a kodak the first day I was there. I recognize some of the photographs as being photographs of the land of section 30. There is a large tree that would make such a picture as Exhibit Number 5. Ex-

hibit Number 6 I remember there was a position of myself and others when he was taking the view somewhere at B, with the camera pointed in a northerly direction. I cannot identify Nos. 7 and 8. No. 9 has the appearance of the swamp there, but I did not observe the taking of the picture.

61 Nos. 10 and 11 I recognize objects that were in existence at that time which would make such pictures as these.

No. 12 looks like a picture of the ground as I looked at it on that day.

I see in photograph No. 13 fences and trees and raising ground that was in the place that would make such a picture.

No. 14 has the appearance of the grass in the picture that was on the ground at that place.

No. 15, I feel sure that is the picture of the scenery that exists between that position of L looking in the direction of the arrow.

I think the pictures I have referred to are pictures of the land as indicated by the letters on the plat.

Cross-examination:

I mean the views I signified as recognizing. I did not mean to testify that the views are correct except those I have designated.

J. T. PAINTER.

Age 55; reside at Spencer, Iowa; I have been engaged in civil engineering in Iowa for nine years; seven years as county surveyor of Clay county. I prepared plat Exhibit No. 21. The red lines indicate the Government survey of section lines and meander lines of sections 19, 20, 29 and 30, township 97, range 34; I have known the land since 1890. The meander lines as run by the Government survey is around what is platted as Lost Island lake; the north part is called Mud lake. The red lines represent the meander lines of the supposed north part of Lost Island lake; were drawn by me from the Government field notes and survey. I took levels around the meander line on the land and between the meander lines

62 as compared with the waters of Mud lake. I placed on plat Exhibit 21 numbers 1 to 12, inclusive, about the place I took the levels; these levels were taken August 6, 1897, the waters were higher at that time than it had been for two or three years.

Mr. A. C. PARKER: To save time I will concede that he found and will testify that the levels are as indicated on the plat. If it will save any time I will concede Mr. Painter will testify to the levels as taken, as shown on the plat, as shown by his figures, and that he will so testify and that the plat may be taken as his full testimony as to such levels at the different points indicated on the plat, and he may now, or some other time before the trial is con-

cluded indicate by proper markings or figures the places where he took the levels and what he found.

There was a point about the north corner of section 29, at that time the water was about knee deep. It had been dry the year before. Plat Exhibit 21 was made in 1890, and I think the water then was about the same as when I took the levels in 1897. The land represented in lot 8 on plat 21 could never have been covered by the waters of Lost Island or Mud lakes; it is too high. There is 138 acres in lot A, 160 acres in lot B, as represented by plat Exhibit 21; there is about 30 acres of lot B that is swamp land, the rest was all farm land and could never have been covered by the waters of Lost Island and Mud lakes; it was too high, except a small portion down to the southwest might have been covered in flood water. There is 160 acres in lot C, as represented by plat Exhibit 21, most of which is high dry land, the waters of Lost Island lake could never have covered the land represented by lot C; except it backed up into a little creek. There was a little ravine bottom, second bottom, and then it immediately goes into the high land. There is
72 acres in lot D of Exhibit 21; it is all high rolling prairie
63 except a little brook that runs through it, and there is a small
piece of wet land at the southeast and northwest. The waters of Lost Island or Mud lake could never have covered this land except it might have backed up and covered simply the creek bed. Lot E as represented by plat Exhibit 21 has 69 4–10 acres. Part of lot E is high, dry land, part of it was hay land and part of it was pasture land.

There is 83½ acres in lot F as represented by plat Exhibit 21, that was all dry land except a strip of wet land across the narrowest part about midway to the east which I call hay land. The land between lot F and the south meander line of Mud lake was wet in 1890, there was reeds growing on it but no water.

Cross-examination:

The round, red mark at the small A is the original Government corner of the northwest of section 30; I found a well established corner there; between that and the bank of Mud lake the ground is all wet. I should judge the corner is about two feet above the water.

Q. And what is there that represents the bank of Mud lake on this plat?

A. There is a blue line represents the edge of the high water, and there is a black line that I have surveyed for the edge of the farming land. Between the blue line and the black line the ground is wet and marshy.

There is not a very distinct bank along the north line of Mud lake except near the west part of section 30. I testified in the case of Grant *vs.* Eaton.

Q. And, on cross-examination, wer-n't you asked this question: Q. "What sort of a shore or bank or margin has this Mud lake on the north?" A. "The bank and shore is distinct all the way, except where this kind of wet place, where this slough would run into the lake in time of wet weather." Where is that slough that you referred to, and, didn't you so testify on that hearing?

A. This slough is up about 11 chains from the west line. There is a pretty good bank, then, for the next 14 and one-half chains there is wet land.

The wet land extends northwest to the Government corner. The bank is not distinct between the dry land and the water, but between the dry land and the wet land. It is apparent that during wet years land covered with reeds and rushes would be covered with water. The meander line on the east side of section 30 runs up over high land; it started near the wet land at the southeast corner, the first 17 or 18 chains, then it bears to the right over the wet land. The meander corner of sections 29 and 30 is out in the wet land or hay land. The corner is six chains east of the inlet or brook; it is on second bottom land. Lot F includes what is known as the island. I drew the straight black line east of the island for convenience. There was two different parties expecting to lay claims to these lots. About half of lot E is low pasture land, about three or four acres of it is quite wet and boggy. I think in the Grant *vs.* Eaton case I considered the high water mark as a foot and a half above the actual water level. I think it would be that much higher by the looks of the banks. If the water was a foot and a half higher it would cover a little neck between lot F and the timber point. It would carry the water down to the meander line. There is a well defined bank as represented on plat Exhibit G, at the arrow No. 5, my plat shows it by the black line. The well defined shore line or timber point is represented along there by the black line. It runs by the figures "16 chains and 43 links north of the southwest corner of section 30, it runs 9 chains then north 38 degrees, east 14 chains, north 16 degrees, east 2 chains, north 43 degrees, east 15 and 50 links, north 67 and a half east." Of this distance about one-third is good shore line and the other two-thirds runs across the wet land.

Re-direct examination:

The condition of the high embankment as indicated by the black line from the north half of section 30 is not a perpendicular bank, but ground that raises immediately above the wet ground and slopes up to the higher ground 15 or 20 feet.

Q. State whether or not there is any indication on that hill of its being a bank, or of the water having washed into it, or whether it is a continuation of the grass and sod from the low land up to the hill?

A. For the first 11 chains it is quite a bank there; for the next 14 chains and one-half there is no distinct difference of bank between, but for the rest of the distance it is a division between the low wet land and the high land, the dry farm land.

Q. And now what is the condition of the land along lot F, between that and the place indicated as water on the plat, as to being well defined bank, or a rise from the low lands to the hill?

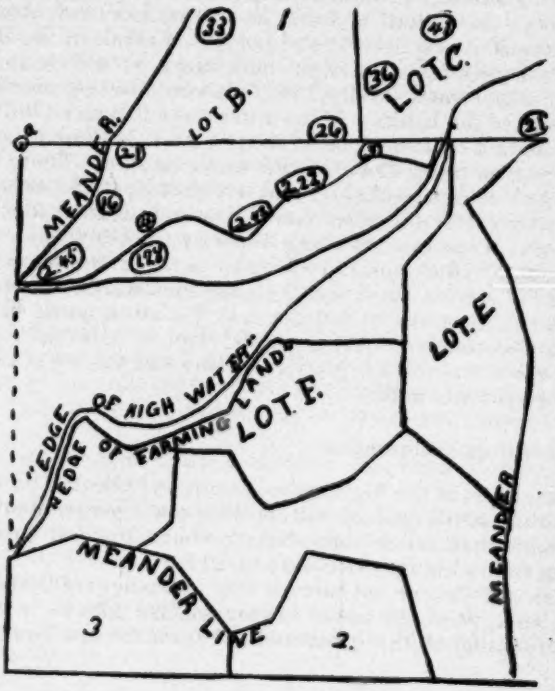
A. On the northwest part of lot F about 12 chains there is a kind of a bank there; the rest of the way I surveyed around and took in about so much of what is dry land, and continued then over and took in some of the hay land there. I didn't see any other banks there.

I took some levels along the black lines of the soil or swail. Plat Exhibit 21 correctly shows the survey I made of the land embraced within the meander lines of the original Government survey.

66 The defendant offers in evidence Exhibit No. 21, being the plat identified and testified to by Surveyor Painter.

Plaintiff objects to Exhibit 21 as incompetent and immaterial.

EXHIBIT 21.



E. B. EVANS: It is admitted that the defendant, Hemphill, has engaged in cutting timber on lot 14, and the defendant, Ryan, on lots 12 and 13 of the land in controversy.

W. L. HEMPHILL, called by plaintiff.

I am one of the defendants in this case; the injunction was served on me some time in January; after that I saw timber being
67 cut from part of the land in controversy claimed by Mr. Ryan. I was over there; I was not helping him haul timber, I was there when they was cutting; I did not assist in hauling it away. Mr. Valley was doing the cutting. I was going across to Miss Ryan's. At that time I had no money and property, only a homestead. I suppose I was insolvent. I got some of the money to buy this land from my father, and some of it from Barringer's bank.

Mr. E. B. EVANS: For the purposes of this case it is admitted that the defendants, Hemphill and Ryan, are insolvent.

W. L. HEMPHILL, called on behalf of defendants.

I live on section 20, township 97, range 34 Palo Alto county, Iowa. Have lived there most of the time since 1890. I have lived on what is known up there as the unsurveyed land. I live about where I have put the letters, W. L. H., on Exhibit 21; lived there until a year ago last fall, when I moved east about 80 rods down on section 20, about where I have put the initials "W. L. H." on plat Exhibit 21; have lived on that land all the time since I moved on except from November, 1890, to September, 1892. I have marked on Exhibit F, with a little ink cross as nearly as I can, the two places where I have lived. I am acquainted with lots 2 and 3, where Mr. Schlosser lives. The unsurveyed land of section 19 is rolling prairie land, or was at one time; it is cultivated land now; there is a little creek on it runs down across section 20, across the southeast corner of section 19. There is no lake on it, never was. The land on section 30 is part high land and part of it is marshy, wet land. The north part of section 30 is grass land or swamp land. It can be pastured and mowed; that has been its condition for 10 years that I have known it. The land between the black line and the north line of section 30 is high, dry land. Can all be cultivated except
68 a little on the southeast corner of section 19, it is practically all under cultivation. Some of it has been under cultivation for 15 or 18 years.

The land between the two blue lines on Exhibit 21 is wet land. It varies; I have seen part of it plowed up, that part down at the west side of what is known as Mud lake. I have seen a part of what is known as Mud lake in section 30, in cultivation; it would be lot 7 and 8, or the south half of the northwest quarter.

M. L. PARR.

I live in Ruthven; have lived around there for 22 years. I know section 30, township 97, range 34; have known it for 22 years; been around it a good deal, drove around it; I am acquainted with what is known as the island in section 30. The land between Schlosser's house and the island is kind of low, kind of grass growing on it when I was there a year ago and I have been there before and it was about the same. It was about 20 years ago that I was north of Schlosser's house, the ground was low and wet, there was reeds and grass and canes growing there, I have been there frequently during the 22 years; drove hunters around there. Grass has been growing on there for the last 4 or 5 years. Mud lake is north of the island. I can't say exactly whether Mud lake comes south of the island. I have known Mud lake to be quite dry in the last 6 or 7 years. The road near the county line in Clay county was graded up several years ago just west of the lake; it obstructs the flow of water through there; I think it has been within the last 12 years that it was graded up.

69 Cross-examination:

Ruthven is about two miles from Elbo lake, no, Elbo lake is about 80 rods from Ruthven; I thought you meant Lost Island lake; Elbo lake is just south of Ruthven.

Q. When you came there in 1878, what kind of a lake was that right south of Ruthven?

Objected to as not cross-examination and immaterial.

A. It was a pretty deep lake, not very large, about six feet of water in the deepest places. There was no weeds in the center for a number of years and the last few years it has practically dried up.

Q. Before that time it was considered a well defined lake?

A. Oh, no; not considered that; there was a lake there, what was called a lake, but there was not very much water in it.

All the lakes up north there, Lost Island lake and all the other lakes were higher 20 years ago than in later years; Lost Island was 3 or — feet higher, Mud lake correspondingly high.

Q. Do you remember, Mr. Parr, of driving Mr. Schlosser and Mr. Kirkpatrick and myself out around Mr. Schlosser's farm last January?

A. Yes, sir.

I remember water coming in at that time along the west line of the timber point from the north side and around to the east side. There was a little water around there, not very much; in driving up we had to drive on the dry land going to Schlosser's house.

Q. Now, isn't it true, Mr. Parr, to call to your memory, isn't it

true all this land north of Mr. Schlosser's and between
70 that and the island in there in an early day was covered with water the greater part of the time?

A. Not a greater part of the time.

Q. You have frequently seen it covered with water?

A. I have seen water there.

In early years the postoffice was at Mr. Anthony's. I used to be over there. I paid attention to the land north of there and how it was covered with water and where the water line began.

Q. Have you seen this portion north of the house covered with water?

A. Not very much; very little.

I have seen quite a body of water in Mud lake; it extended north of Schlos-er's and east; the body of water was large in the early years. It began to recede and dry up in the last 6 or 8 years.

S. BANFILL.

I am 52 years old; I came to the country north of Ruthven in the spring of 1871. I lived there about 7 or 8 years, then lived in Des Moines a few years, and for the last 10 or 12 years have lived up here again. In 1879 I had a farm on section 24, in Lake township, Clay county. Section 24 is just west of section 19, township 97, range 34. My farm was on the northeast quarter; the south half of the northeast quarter. I lived there for 7 or 8 years from 1871. Am familiar with the land around Mud lake, been around there a good deal; have been across section 30, township 97, range 34 a large number of times. I bought wood of Mr. Anthony on that woodland there, and used to go across and chop and haul wood. After I had been here two years there was a postoffice at Mr Anthony's, and I would go there to get my mail. I went across the east part of section 30 to get it.

71 Some of the time I went right across; sometimes I went around on the east part. I am familiar with that part of the land designated on Exhibit 2 as marshy pond called Mud lake. In the fall of 1871 it was nearly dry; the west part in Clay county was about all where you could see any water. You could not see any water in Palo Alto county. The dotted line on Exhibit 2 correctly shows the boundaries of what is called Mud lake proper as near as I can tell; I am acquainted with the so-called island north of Schlosser's house; I think the land between Schlosser's house and the island is swampy. I don't think there is any part of Mud lake south of the island. There is a kind of extension of the lake, a pond, a small place south of the island, I never called it a part of the lake, I just called it a pond or slough; it might have been connected with the lake. The postoffice was kept by Anthony from 1872 or 1873 to about 1879. It could not have been so very far from Schlosser's house where I would go across to get my mail; I most always went

horseback. Part of the time I went cat-a-corner across. Don't think I went through there much in the summer; only in the fall. I think I must have crossed this inlet near where Hemphill's house is. We got our timber off the island in the winter time. The lake was higher some years than others. It was nearer dry in 1871 than I have ever seen it in the last 7 or 8 years. After 1871, there were several years that the marshes got dried out so that you could go over them, that was between 1871 and 1879.

Q. Now, which marshes do you refer to; any on this section?

A. Well, you could cross from the old Anthony place over on to that island where the timber was; I went over there one time; I noticed there was some one had been planting corn there on
72 the island; I didn't have any idea from the way it looked years before they could cross there in the summer, but I saw some one had been planting corn there on the island.

It might have been 1880 or 1881 when the corn was planted on the island. I didn't notice how they got over there to plant their corn; I saw it was planted with a planter. During those years the land between the island and Anthony's house had been pastured several years. I don't know just what year I noticed the cattle there first. There was hay cut on the bottom and east of Anthony's, kind of between Anthony's and the island. I could not say surely what years, but it was during the time Anthony was running the post-office before 1879. During the years I was living there there was grass growing between Anthony's house and the island right along, but in the wettest times it was covered with water; I mean after a heavy rain, some summers we would have heavy rains, several of them, so the roads would be nearly impassable to travel. Such times as that there would be lots of water in there; in ordinary seasons the grass would grow on the low land between the island and Anthony's house. There was one place, a kind of pond, and the grass did not grow much there, the pond covered 2 or 3 acres. The pond was just about north of Schlosser's house. I would not call it a lake, just a pond; the other land in there north of Schlosser's house and up to the island I would not call a lake. There was a great deal of grass and reeds growing up in the lake in the summer of 1871, you could not see so much grass for a year or two after that.

Cross-examination:

I lived on my farm 7 or 8 years, then in Ruthven about 3 years, then in Des Moines 3 years, then lived in Ayrshire about 3 years and then went back to Ruthven; I have lived
73 there ever since. Mr. Anthony lived on his land after I left my farm and moved to Ruthven; I have never been out to the land since I came back to Ruthven in 1893, and have not been on the place since I left, in fact. I remember the timber point as designated on plat Exhibit G, and where the island is, and I re-

member the depression as indicated on the line between A and A; it is quite a large depression. Around in front of Anthony's house is quite a well defined bank or abrupt raise on which there is timber growing; plat Exhibit G looks as if it might be as I remember it, and I remember up northwest of the house there was quite a little raise there on which there was trees growing. From that point over to the lake north of the point is what I would call swamp land and off to the east for quite a number of rods continuing up to the section line, as I seen it, is a large flat east there. When I went after my mail on horseback I went around east of that flat land and struck the Palo Alto county road, but when I walked I came up by the island, came up through the flat east across the end of the island. I have not seen the flat east of the house on this low land covered with water very often. I have seen it, but not the first year. I think the lake was higher from 1872 to 1873 up to the time I left there than it has been since. I don't remember cutting across there on horseback except when it was froze; I didn't know whether I could or not; I didn't like to try. I don't think I could go across there on foot when it was extremely wet without getting in the water. My mother walked across there one day, it was quite wet and she got her feet wet; think I could have crossed there the same time and probably not got wet. I went horseback and the other way the most. When I had to go around I rode.

Q. Why didn't you cut straight across to where his place was at those times?

74 A. Because there was a creek there; I didn't care to wade through it.

Q. Was there a creek there or was it the lake?

A. If you would go direct, straight from my place to Anthony's, I think you would strike the end of the lake, but there was a creek there that made me go around quite a piece further than I would if the creek had not been there; the creek was the inlet to the lake.

It looked to me like it was about the middle of the section, of section 30, the distance seemed to me as though it was about that. Aside from the creek you could cross. I don't know as I could designate on plat Exhibit 2 where the creek emptied in Mud lake; the bed of the lake came around the timber point and close to the island.

Q. Now, I understood you to say that you saw where they had been planting and raising corn on this island at one time after you came there, and after 1871; is that right?

A. Yes, sir; I went over onto the island one day, and I saw some one had been planting corn there; I don't know who done it.

Q. How did you get onto the island?

A. I went across from the old Anthony place to the island.

I walked across to the island; was surprised that they had planted corn there. I supposed the land was Government land, and I wondered who had put it in. I bought timber there of Mr. Anthony,

and then I knew a short time afterward that he did not own it. I had bought the timber and taken it away before I felt sure that he did not own it. I did not notice whether there was a well traveled road across there or not. I don't know that I ever knew of a team ever driving across there; there might have been fifty and I not known it. A person could step over the creek where I crossed
75 it; as it got down nearer the lake it got wider. I had to go to nearly the extreme northeast corner to cross it. I could not cross it below down by the lake; there seemed to be a running stream there. The creek dried up except for the springs in the dry time. I could get over it lots of times with a wagon without getting the wheels wet. Some of the time there was water there and some there was not. In an ordinary high stage of water there was water there.

Q. In ordinary years haven't you seen that stream running, and isn't it a stream that drains the country away up from Twelve Mile lake down into this lake, that is what I am asking you?

A. The answer is that some of the time there was water there and some of the time there was not.

Q. Was water there the ordinary seasons of the year, the ordinary high stage of water in the lake, was the stream running?

A. Yes, sir; in an ordinary high stage of water there was water there.

Q. That is what I am trying to get at?

A. Yes, sir.

Q. And, in an ordinary high state of the water in that lake there was a large sheet of water there that run clear up on section 30, up near to the island, and extended clear over to the land in Clay county, isn't that true? The ordinary high state of the water during the first years you were there, isn't that true?

Mr. E. B. Evans: Objected to as not being a competent question; there is no such thing known as ordinary high.

A. I don't think that that is right.

Q. Well, what is the fact? What ain't right, my question?
76 A. No, your answer to it. You answered your own question, and I don't think you answered it right.

Q. Well, you answer it.

A. You will have to explain to me what the ordinary high stage of the water is in order to answer that correctly.

The lake covers a half section of land probably. It extends nearly to the island. I would not call anything a continuous sheet of water where there was just a little bit of water among the grass and rushes. Rushes grow in boggy land and where there is a sheet of water covering the surface.

Re-direct examination:

I crossed the creek quite a little south of the north line of section 30, from there down it gradually widens out into the lake. The water goes from there into Trumbull lake. Trumbull lake got very low in 1871, but not anywhere near dry. The raise and fall of water in Trumbull lake would not necessarily affect the water in Mud lake; Mud lake is higher. In the spring of the year after the snow melted the creek had water in it. In dry seasons in the summer it dried up so that cattle would not get water; the average summers the water dried up in the creek. If there was a ditch dug from Mud lake to Trumbull lake it would drain all the water out of Mud lake. The distance between the two is about a half mile, and a ditch between the two would have drained Mud lake during the years I was there. There was a large body of land up there known as the unsurveyed land.

Re-cross examination:

Q. Now, how do you know this ditch would drain Mud lake? Did you ever strike any level between the bottom of Mud lake and Trumbull lake?

77 A. Well, sir, when I lived up in that country I was not entirely asleep. I had a notion of draining that lake at one time, to get it dry and enter it, but I made up my mind, after I took a thorough examination of it, I made up my mind that it would be so much trouble in ever getting a title to it that it would not be worth while, so I gave up the project.

Q. Now, just answer the question?

Read the question, Mr. Reporter.

Previous question read as follows:

Q. Now, how do you know this ditch would drain Mud lake? Did you ever strike any level between the bottom of Mud lake and Trumbull lake?

A. Well, sir, I can't say that I have, not to get the exact level, but I figured it out close enough so I knew about what it was; it was, as near as I could make it, it was about five feet.

Q. What is five feet?

A. Mud lake above Trumbull lake.

Q. The bottom of Mud lake?

A. No, sir; the surface of the water of Mud lake when the lake was full, and the surface of the water of Trumbull lake.

I went along and noticed where each fall in the creek was; the creek didn't flow steadily; there would be a place that would be level and then there would be a little fall, and I measured the fall with my eye. This creek between Trumbull and Mud lakes is about a half a mile long. I don't know how large the first fall was nor how many falls there were, nor I can't tell how many inches the second fall was. I presume the opening into this creek was about

a foot deep at that time. The bottom of the ditch was on a level with the bottom of Mud lake; Mud lake was shallow at the shore, but if you went out a little ways there would be three or four
78 feet of water. I put a pole down in lots of places to see how deep the water was and measure it with my eye. It was just a little natural ditch, there was running water from one lake to the other, when I saw it, just a little stream about as large as a man's arm. I should judge Trumbull lake in some places was 7 or 8 feet deep, quite a large body of water.

FRANK GRANDY.

I live at Ruthven; am in the railroad business; lived there ten years. Know where George Schlos-er lives, have known him 6 or 8 years. I was on the land yesterday morning with Mr. Grift, Mr. Valley, and another gentleman, Davis, I think. We had a plat there similar to Exhibit 2; there was some water on the lots designated as 12 and 13 on plat Exhibit 2 and at Mr. Schlos-er's house; there was weeds and rushes all over the land there between the island and point, did not run east to Lost Island lake. I cannot point exactly where we drove with our team; we passed Schlosser's house, passed his grove, then turned in between the two islands, we did not drive over there, we were going to, but only drove to the edge; we then drove west to Mud lake, up to the point of the Clay county line; there was no water between the west point of timber and the road we drove out on and came to the main road south. We did not go over to the island.

COURT: Why didn't you go over to the island?

A. I don't know.

We were going over there, but it was rough and there was a little water there and I was afraid the horses would get down. I told him he had better not drive through there; there was a little water and bogs there.

79 Cross-examination:

There is two timber islands there, one opposite his house, one further west; the one west is a point, it is not an island. I don't know much about it, only what I saw yesterday. We were on the south side of the timber point. There are several groves, one north of his house, one on the point, and one on the island, and one east of the house; we were at the grove west of the house. We went over to the point toward Mud lake, then we went straight south and came home. I only knew what they told me about the premises. We were on lots 12 and 13 both. They told me it was lots 12 and 13. Mr. Valley had the blue print. I did not know whether it was section 30 or 40; took Valley's word for it.

J. T. PAINTER, recalled.

Cross-examination:

I have completed plat 21, and the red round marks represent the levels that I found at different points. I took no levels in running this line from the meander line on the west side of south half of 30, nor in running the black line across southeast from the timber point, and then running northeast from the south end running over to the island. If the water was a foot higher in Mud lake than it was when I run that line, I think it would extend down to the bank north of Schlosser's house. It would run through between the island and the timber point. I did not survey the blue line up north except taking the measure across it. It was 2 chains across it. I drew the black line as far as the lake shore, and took that point and marked the south line on the inside of it, to show where the lake was, where the blue line leaves the black line was
80 drawn by estimation, and the blue line south of the black line on section 19 was drawn next to the black line for 11 chains, then it was drawn by estimation.

Q. Is there not high dry land here west of the blue line, between the island and the timber point. Quite a stretch there of several rods of practically flat land before you strike an elevation of dry land.

A. Yes, sir; there is. This black land follows along, and between the dry land and wet line that I surveyed, the land on each side of the narrow strip surrounded by blue. There is low land until you get out here to the island, low, marshy ground, and it runs clear around the island, some wetter than the other. I drew the blue patch east of Schlosser's house by estimation. That was wetter ground in there; it is more boggy and bunchy, more reeds than that lying east of it out to the meander line. I don't know how it was in 1857 when the survey was made, except the island and the point it might all have been covered by one continuous body so far as I know.

Q. I say it might for anything that you saw there, taking the level of these different points that might have all been covered by water except the island and timber point.

A. It could not have been in 1855, because 1855 was an exceedingly dry year.

The township range was surveyed in 1855, the subdivisions in 1857. 1857 was a more wet year, and it might have covered a large portion of it. My object in making these levels was to ascertain whether section 19 was surveyed or unsurveyed land. I subdivided section 30 in 1890, late in the fall. It was rather dry. There were hunters all around there shooting. There is no well-formed sod, and it is boggy from the point where I crossed the black line from the island to the timber point. Section 19 is too long north and south,
81 and too short on the west part. The west line on section 29 I think is a little too long. The red section lines are my sur-

vey, but the meander line is intended to represent the Government survey as near as I can retrace it. I can give them the full amount by retracing it, but if I would put that point that should be on the line farther east on the line, it would cut their land a little short. I do not find a corner at the northeast corner of 30. It is wet land there; not fit for a corner. I mean that it is land that the Government surveyor does not make a permanent mound on, and I did not examine for a corner at all. The Government field notes call for a witness corner at that point. The field notes would put it about the same as I put it there. I think about three-fourths of lot E is land they would not put a permanent monument on.

Re-direct examination:

The blue line shows the channel of the inlet or outlet correctly where I measured, and as nearly correct as I could draw it by sketching while I was on the ground. I took notes about how far it looked to me. At certain points it looked like the water or pond, and I drew it, and where I measured it I put the measure down. The black lines were run according to measurement. It was only the blue lines I estimated. I surveyed west of what is known as Mud lake, for a road in 1884. For 15 or 20 rods wide there is a strip of wet land with a kind of a channel where the water runs west. There has been a road graded there since I surveyed it, and a little bridge over the channel from the outlet.

Q. What effect does that grading there have upon the west of what is known as Mud lake?

A. During the high water it could not flow off as quick; during medium water it would not have any effect.

82 Re-cross examination:

The bridge is probably twelve or sixteen feet long. There was kind of a double channel there when we surveyed it, and we put it all into one. I was in the southern part of the State in 1857. Came to Iowa in 1855. In 1857 there was a very heavy snow, extremely heavy. That was the spring of the Spirit Lake massacre; the last of the snow did not go off until April.

Re-direct examination:

Inside the red lines give Mr. Schlosser the full amount of acres in lots 2 and 3, as shown by the patent from the Government.

Objected to as irrelevant and immaterial.

Q. I will ask you if at the time the township and range line was run in 1855 between 34 and 35, was it run through what is known as Mud lake?

A. According to the field notes it was measured through; they did not offset as they did at Lost island.

I have examined plat Exhibit 2 and I think it correctly represents the land within the meander line of what is known as Lost Island lake. The dotted line on plat number 2 designated as "actual margin" correctly represents the body of water known as Mud lake in its ordinary stages in sections 25 and 36. It was drawn a little wider north of the island on section 30. Then I drew it, but is probably more correct than I drew it myself.

Re-cross examination:

I saw the stages of the water of Mud lake in 1884, on the west. I was never over on the east line until 1890, when I was sur-
83 veying there. I saw it in 1897. Have not seen it except when I was surveying it. I could not say that those were the ordinary stages of water any more than what I seen the appearance of high water on the bank, little drift sticks and appearance a little back. I did not survey the meander line around lots 2 and 3. I surveyed part way; began at the southwest corner of 30, surveyed north to the lake, then followed the meander line. The red meander line is drawn by the Government field notes. I did not survey it on the ground. The field notes do not mention any quarter corner on the northwest line of section 30. It does all the other lands.

Q. You do not understand from that survey that there was not a lake there when they were surveying that, do you?

A. Yes, sir. North, between sections 25 and 30, 16 chains, 43 links, set meander post on south side of lake; lake bears northeast and southwest." I am reading from the Government field notes. "Made mound of earth and sod, pit 8 links south, 59 chains, 31 links; set meander post on north side of lake; made mound of earth and sod, pit 8 links north of post, 80 chains, set post corner to sections 19, 24, 25 and 30; made mound of earth and sod, pit 8 links south of post, corner, in swamp; swamp from corner bears east and west. That is pretty correct as I found the land there afterwards about Lost Island lake, starting in at the southwest corner of section 31 running north between 31 and 36, is in the lake. I will read how that started. "60 chains, 25 links, set post on north side of lake and then it goes across the witness post; lake bears southwest and northeast; 80 chains, set corner post to sections 25, 30, 31 and 36; got the distance from township corner in lake, beginning at quarter corner of township line west of lake, north 60 chains, 25 links, thence east 40 chains to true corner."

84 Q. Now, in surveying across the other land, they don't tell how they got the distance, and that is the reason you guess they waded across there?

A. Yes, sir.

Re-direct examination:

East, corrected between sections 30 and 31, 37 chains, 40 links, scattering timber, bears north and south, 34 chains and 92 links, set a quarter section post; there is description of bearing trees, 45 chains, leave timber, bears north and south, 64 chains and 42 links, lake, marshy, set a meander post in mound of turf, pit east 8 links; 74 chains 92 links, section corner, surface level, soil 3rd rate, timber oak.

Plaintiff offers in evidence record of field notes.

Field notes, pages 212 & 213.

West random between sections 30 and 31 var. E 10 53.

Chains.

74.92 Length of line between sections 30 and 31.
E corrected between sections 30 and 31, var. E 10 44 grees and 44 seconds.
37.40 Scattering timber bears N. & S.
34.92 Set a quarter section post.
Bearings: Burr O. 10 S. 63 W. 36
D. 10 N. 53 W. 46
45.00 Leave timber bears N. & S.
64.42 Lake marsh. Set a meander post in mound of turf, pit east 8 links.
74.92 Section corner.
Surface level soil, 3d rate, timber oak.

85

North between sections 39 and 30 from meander post between sections 29 and 32, variation east 12.
Offset north 15 chains, thence east 6 chains, thence north 25.00 chains, thence west at (right angles) 5.40 links and intersect lake and marsh bearing north and south.
40.00 Set a quarter section post in mound pit east 8 links and east of true quarter corner, 10 chains and 30 links, thence north from witness ¼ S. corner, 30 chs., thence 10 chs. and 30 lks. west to marsh.
70.00 Set meander post as witness to true section corner, made mound of turf and pit east, corner to sections 19, 20, 29 and 30 (and 10 chains south of true corner in marsh).
75.07 Length of line between sections 19 and 30.
East corrected from section corner post on range line between sections 19 and 30, var. E. 10 53.
13.63 Intersected marsh. Set a meander post in mound pit east 8 links.

Page 368.

North between sections 25 and 30, var. 11 degrees, 45 seconds E.

16.43 Set meander post in south side of lake.
Lake bears N. E. and S. W., made mound of earth and sod pit 8 links south.

59.31 Set meander post on north side of lake, made mound of earth and sod pit 8 links N. of post.

80.00 Set post corner to sections 19, 24, 25 and 30, mads mound of earth and set pit 8 links south of post, corner in swamp.
Swamp from corner bears E. and W.
Prairie level, soil 1st rate, growth grass and weeds.

86 EDWARD BEATTY.

Live in Lost Island township, Palo Alto county, section 19. I am acquainted with Exhibit Number 2, and the land embraces in it. I have had in cultivation lot 8 of section 30, township 97, range 34. It was in 1895. I sowed it to flax about the last of May I think it was. I have known the land since 1890. Lot 11 has had some water on in the spring, in extremely wet times. I cannot say whether there was ever any water on 15 or not. The land- in lots 11 and 15 are practically dry in the fall except spots. It has been pastured every year, practically, since 1890. I think a greater part of lot 14 has been covered with water part of the time. I have not known it all to be dry. There is a spring there; the east half of lot 14 is high rolling land, timber growing on part of it. The east half has not been covered with water since I have known it. The east and south part of lots 12 and 13 at high stages of water would be overrun. The water has receded from that portion of lots 12 and 14 during the years I have known it, and it has been pastured. If there is 52 and 16–100 acres in lot 12, I should think there was 10 or 15 acres that had been covered with water, and that only in exceedingly high water. If there is 49 and 25–100 acres in lot 13, I should say that during stages of high water 15 acres had been overflowed.

Cross-examination:

I was not there when these lots were surveyed. I only know where the lot line is from the plat. I don't know as I could find the lot line exactly without measurement. I think lot 15 could be mowed. Have seen it pastured by Mr. Schlosser different years along since 1890. He has pastured it, and cattle have grazed
87 there and run over it all times of the year. Have seen water stand on lot 11. Lot 12 is part timber and high land; balance is marshy land. I understood there was 52 acres in 12. The north line of lot 12 is timber, high land. The timber lines

run across probably 60 or 70 rods, clear across the whole lot. The timber point there is probably between 40 and 60 rods. It is all low around the island; except the island and the timber point all the land on section 30 is a kind of a second bottom land. The bank of the lake on the north is a well defined bank part of the distance. I have seen water up there in the spring of the year. I had my flax on lot 8 and part or lot 7; had in about 50 acres. There was no sod there. I called it the bottom of a marsh. It produced very little flax. I did not harvest it; it did not mature in the fall and the weeds took it. No water got on it. It would not have been worth cutting. I think probably it was wet the next spring. It was the only spring I would have undertaken to have cultivated that land. There was some water in the lake bed this spring. I lived in Ruthven from 1883 to 1888. There was a large lake near Ruthven—Elbow lake. I do not think Elbow lake was 8 or 10 feet deep. I do not think there was any places over 5 or 6 feet, possibly 5 feet. Quite a little sheet of water. There was rushes, grass and stuff in there, around the edges, and in parts of the center. It dried up one year. In 1892 and 1893 I crossed there a great many times. There was a bridge across it on the Rock Island road. I testified in the case of Grant against Eaton, that the north shore of Mud lake had a well defined bank part of the way. Some places it was 16 or 17 feet deep, and then there was a second bottom like. There was an inlet there; quite a volume of water came in from the surrounding country. I was one of the defendants in the case.

88 Am interested in the land above there, and have been interested in these surveys. Was interested in the land in section 19. Right back of Schlosser's house it was quite wet last year; water there in the early part of the season. Quite wet for 30 or 60 days and then it dried out in the fall so that cattle could run on it and graze on it.

Re-direct examination:

Since I have known the land on section 30, it has all been practically of the same character, as to being low marshy ground. It growed up at times with heavy weeds and grass. The weeds growed in the middle of section 30, probably 7 feet tall in the lake bed proper, as they call it. I went clear through them. I had a lot of cattle there. Just outside of 30 on the Clay County side they were very high. The cattle did not eat them down. I had 150 head of steers in there. They ate the flax and weeds and grass that was in the lake, and all around that marsh.

Q. Now, the bank that you have testified to on the north side of what is known as Mud lake, state whether or not those were the banks of a lake or of a hill rising up from the low land?

A. That was a hill rather, rising up from the second bottom land; it was land that of course overflowed at high water times on the north side, but went back quick.

E. D. O'NEIL.

I am a farm hand and acquainted with the land in section 30, township 97, range 34. Have known it since 1895. Was acquainted with it in 1898 when the Government surveyor was out there. I built a shanty on the south half of section 30 that year. I built it in May. I know where the house that Richard Ryan lives in is situated. That is the house I built. I sold it to Richard
89 Ryan. I hauled the lumber on the hill where the shanty was built. We hauled the lumber there with a team and wagon from Alex Hemphill's. We went straight across to the island; crossed lots number 4 and 9. I went across there during that summer about three times a week. The lots were not wet when I crossed it. The land was dry between the place I built my shanty and Schlosser's house, immediately south of it. Ever since I have known it it has been that way. Sometimes it was wet in the spring. That has been the condition of the lots on section 30 since I have known it.

Cross-examination:

I built the shanty for myself. It was not my brother that put the shanty on there. I came out here in the spring of 1896. I went over on the north half of section 30 from Hemphill's to the island. I have drove my team between the island and Schlosser's place. I did not have a load on. It was in the spring of the year 1896. Mr. Hemphill married my second cousin. I have been interested in getting some of this land opened for survey. We hauled the lumber at one load; crossed over there with the team and wagon 5 or 6 times, in the month of May, 1898. I have seen it so I could not get through there with loads and the team and wagon, from the island to the house. I went back up there quite frequently. Sometimes there was a sheet of water in there. I lived in the shanty from May until August, 1898. I then went to Humboldt county. Have not been back there since. I got the lumber in Ruthven; my brother bought it. I paid for it. I remember of Schlosser having a suit against Mike O'Niel. I do not know whether the notice was served before I made the application for survey or not.

90 Re-direct examination:

I made a contract with E. B. Evans to secure the land for me, and it was after I made the contract that I built the shanty. Mike O'Neil had no interest in the shanty at any time.

Richard T. Ryan.

Twenty-five years old; live on lots 12 and 13, section 30, township 97, range 34. My house is situated on lot 12. The house was built in April, 1898, the year that the Government surveyor was there surveying. It was built by Ed. O'Neil. I purchased it from him on August 5, 1898. I moved in the house on August 8, 1898. I had been teaching school before this time. Have been working at farming since. Have worked for Mr. Lee Hemphill some of the time. He is my brother-in-law. I have done most all kinds of farm work that can be done by riding. I have about 7 or 8 acres of my homestead under cultivation. When I worked for Hemphill I would sleep in my house and go to his house in the morning. Sometimes I would stay at his place all night. I drove from my house to his house most of the time. I am crippled and have to use a crutch to get around. I drove across with a horse and buggy. In coming from his house to my own I would drive over lots 4 and 9 and lot 12. Sometimes I would come from the south across lots 12 and 13; and sometimes I would drive in from the east across lots 11 and 14 in section 29. When I went from my house to Ruthven I would usually go out over west lots 12 and 13, and then south down the section line. The south half of lots 12 and 13 has been dry most of the time. In the spring of 1889 the water backed up there and stayed for 30 days on part of it. It was dry the biggest part of the remainder of the season. There has been a lot of water there this spring.
91 There was no water prior to the time the snow fell, and had been none during the winter and fall. The north part of lots 12 and 13 are dry except a little bit of 13. There is a little bit of a pond there. There is 52-15 acres in lot 12. About 35 acres is dry land at all times. The rest is swamp land; low, covered with grass. There is 49-35 acres in lot 13. About 32 acres of lot 13 is dry at all times. The balance is low and covered with grass. I have pastured the remainder of the land except the 8 acres under cultivation. I took in cattle and rented my pasture. Lots 11 and 15 on the south half of section 30 is mostly swamp land covered with grass and sod. They have been pastured during both seasons that I have known it. I never knew the land prior to the time I moved on it. The greater part of lots 4, 7, 8, 9 and 10 on section 30 is about the same as lot 11, with the exception that there is a creek running through them. Robert Beatty has a homestead on lot 5, section 30. William Beatty took lot 6 on section 30 as a homestead. My sister has driven across the land with me usually. Her name is Bela Ryan. She lives on lot 7 in Clay county. Has a homestead on there. She has been working for my brother-in-law, Hemphill, and living on her homestead; would go back and forth with me. I am an unmarried man and live alone.

Cross-examination:

I have been working for Hemphill part of the time since the spring of 1898 helping him farm. Hemphill's house is on section 20. I do not know just what lot on section 20. I went on my land in August, 1898, after the Barber survey; about three months after, I think. At the time of the Barber survey I was living on lot 14 in section 29; lived there about three months. I came to the conclusion that lot 14 would not turn out dry land. I measured
92 it in July after the survey. I made no entry of lot 14 on 29. I think I made my entry in September on lots 12 and 13, but don't remember just the date. It was the day the land opened up. There was a building on lot 12 when I went there. It was a shanty belonging to Ed O'Neil. He had been on there about three months. The shanty was 8 x 12. I bought out his claim on lot 12; paid him $25.00 and took his right of entry and took the house. There is one door in the house and two windows. The house is shiplapped and sided; shingled roof. It is not plastered. I put on an addition 6 x 12 in December, 1898. It was a shanty I found there on my lot, lot 13. I don't know how long it had been there; I don't know who put it there. I took it away because I didn't want it there. I had good reason to believe it belonged to Schlosser, and I went and got it and attached it to my own. I told him to take it off if it was his. He said he would take it off when he got ready. I went and took it. I told him I would take it off if he did not. I didn't ask his consent. I appropriated it to my own use. I think it was perfectly honorable and legitimate to do that when he would not take it off. I use it for a barn to keep my horse in. I plowed the 7 or 8 acres at different times, breaking some in 1898 and some in 1899. I think I broke about 7 acres in 1898. In 1899 I plowed for corn there and broke about an acre more. I planted garden on part of it, and grass seed and timothy; about 3 acres to potatoes, and every kind of garden truck. My pasture is run right in with Mr. Hemphill's pasture. The fence is on the south line of the island. I built part of it; got the material in Ruthven; bought it myself. Hemphill and I bought at the same time. Mr. Hemphill took the cattle and I looked after the fence. Some of them were here all year. Some took their cattle out. There was one man's cattle died the day he brought
93 them in there. Two of them died the next day. I think it was because the drive was too hard. I could not say how many head were taken away during the summer. Right in the spring the land would not produce enough to maintain the cattle. The island was completely surrounded with water that spring for a little while, probably a week or two. I think it was in May. I was in my shanty during that time. Drove out and in with my buggy. Drove the route I usually did to go to Mr. Hemphill's. Passed over there three or four times while the island was surrounded with water. It was very near up to the hub for a few days

east of the island; covered all of lot 11 except about 10 acres along the west side; covered part of lot 15 and part of lots 9 and 10. There is a portion of the island in lot 9. I think it covered about all of lot 8. I crossed over lot 13 during that time. That was in the spring of 1899. There is a little water on lots 8 and 9 now. When I go from my house to Hemphill's I cross over the water. There is probably two or three inches at the lower part. There is a little run there that there is probably 6 or 8 inches of water in. I cross the inlet at the bridge. I usually go out straight when crossing lot 9 to that little island on lot 9, then straight up to Hemphill's house. I might strike the corner of lot 10. I go across the west part of lot 9 because it is the shortest way. There is a gate in the fence down there, and I go for the gate.

Re-direct examination:

During the two weeks of high water when I crossed over lot 13 I came in from the south. There was no water between Schlosser's land and the timber point on lots 13 and 14. I came across on lot 13, or the hill on lot 12 down across the little ravine, and followed the fence and meander line around. During the high water
94 period in coming from lot 12 to 13 I went south on lot 12 from my house almost to the meander line until I came to the corner of lot 13. Then I crossed a little corner of Schlosser's land. We had in the pasture lots 4, 7, 8, 9, 10, 11, 14 and 15 of swamp land. Lot 4 was divided off. The rest were all fenced in. We practically had the south half of section 30 and the south half of the north half of section 30 in pasture. Hemphill built his fence between his land and Schlosser's, until he came up to the corner of lot 12. I took it from there until we came around to the corner of Schlosser's grove back of his house. Then Schlosser built over to the corner of lot 13. He was to build the rest; but he stopped there. I put in the posts for the rest of the fence. Lee Hemphill and Alex Hemphill were present. Schlosser said he would put it in, and he put in part of it and then quit. We said we would put in our part; we would fence around there. Mr. Schlosser said that was all right. He would put in the west side, and we were to put in the east side. I put my side along lot 12, and Hemphill along on the south side of lot 15. Schlosser was to fence the south line of lot 13 and the south line of lot 14. The fence was to run along the meander line between Schlosser's land and the lands on lots 12, 13, 14 and 15. That agreement was made the latter part of May or the first of June, 1899, was made down near Mr. Schlosser's house; down at the meander line I think. After that Mr. Schlosser built part of the fence. Mr. Grout made the survey and found the meander lines. There was an agreement between Mr. Hemphill and Mr. Schloss-r about the running of that meander line. I was present near him when it was talked about. I said to Schlosser we ought to find that man that surveyed the land out. He said we would

get a man and survey it; he would furnish a man and pay half for the surveyor. That was before the fence was built.

We afterwards got Mr. Grout. After the fence was
95 built I was in possession of lots 12 and 13, and Mr. Hemphill in possession of all the rest lying north of the fence that ran along the meander line. Mr. Schlosser did not keep any portion north of the meander line for any purpose. Mr. Schlosser spoke about the land several times. One Sunday he and a couple of men were hunting on my land. I told Schlosser I didn't think it was a right thing to do, hunting on Sunday; that he ought not to come on my land. He said he knew I had possession there and could keep him off, and would go off if I said so. He afterwards asked the privilege to hunt there and let his men hunt there; and I granted it. I told him if he would let me go over his land I would let him hunt on my land. There is no established road coming up to lots 12 and 13 on section 30.

Re-cross examination:

Mr. Schlosser had a fence 6 to 10 rods south of the fence we built. It extends around a piece of plowing he had there. He had the land fenced on the east. He sold that fence to Hemphill before this. I was not present when he sold it. Schlosser may have built 20 rods of fence. I don't think it was more than 12 rods. It was right up by his grove from the southeast corner of lot 13 east to the first meander corner. That is the only fence he built. There was nothing said about Mr. Schlosser's water privileges being cut off. I could not say whether he had built up to that point before we had our agreement, or not. I cut the posts off lot 13. Schlosser said something about lot 13 being in litigation. He said he would put in the fence as soon as we got the decision on lot 13—the decision from the Government, from the receiver, I think, from Des Moines.

We got the decision in June. He put the fence in in June.
96 I don't know whether he appealed from that decision, or not.

I never received notice of it. I built my part before we got the decision. Hemphill built his before we got the decision. I built along in December or January, 1899. Mr. Schlosser simply built the fence out there a few rods and left the balance open.

RICHARD T. RYAN, recalled.

Mr. Schlosser made a statement to me along in the summer when I asked him when he was going to finish out the fence. It was after he built that portion of the fence; two weeks or a month afterwards. he referred to the decision on lot 13, where Mr. Schlosser had contested my homestead entry. There was a trial on that contest in Des Moines before the register and receiver in January, 1898.

Objected to as incompetent and immaterial and as not the best evidence.

The case had been decided by the register and receiver. It was decided in June, I think, of 1899. Mr. Schlosser was present at the trial with his attorney. My attorney notified me that an appeal had been taken.

Objected to as incompetent and immaterial, and not the best evidence.

Cross-examination:

There was nothing said about the decision when he first promised to build the fence. I pretend to say that with that contest still pending and in litigation he promised to build the line fence, and at that time he never said a word about the litigation. We were alone when he spoke about the result of the contest. I never had a shanty on lot 13. I entered it when I entered lot 12, in August or September; don't remember the dates; entered both lots at
97 once; Schlosser put his house on there in September or August, 1898. I took it off in December, 1899. It was in October, 1899, that Schlosser was hunting on my place. I drove over his land in the summer of 1899. I didn't ask permission.

JAMES VALLEY.

I live in Clay county; am 45 years old; am a farmer. I am acquainted with section 30, township 97, range 34. I live on section 27 in Lake township, two miles from the county line, and have lived there 14 years. I stopped with Mr. Hemphill last fall until about the first of March on his place in section 20. I have been over the land near Schlosser's house at different times within the last six months. I know where the boundary line is, that is, what is called the meander line. I have been over the land where the Beatty's live and where the Hemphill's live. There are two parts of the unsurveyed land. Lot 11 of the plat Exhibit 2 is grass land. Lot 15 is grass or pasture land. Lot 12 is part of what is called the island. The land south of the island is low land; kind of a wide leaf grass grows on that land; it is all grassed over, with a little water in the bottom of it. Lot 13 is the same kind of grass land and the same kind of timber land. It is all grassed over. The lake does not come down there. Over beyond water overflowed back in there when high water would come; but the lake itself does not run back in there. I saw the land yesterday morning. The grass was away above the water. I should think a fellow could walk through there with an ordinary pair of boots on right across from Schlosser's house to the land. We drove along the ridge of low land and across lots 13 and 14. There was no sheet of water there. We drove up to the water line and looked straight across. There was water
98 and there was grass and weeds growing up all over it. There might be places where they would not be as thick as other places; but there was grass and rushes and this wide leaf grass all

over the lake. It was last year's crop. I don't mean there was any new grass in there. I have saw cattle all over there last spring. I had a lot of cattle last spring and wanted to get them in there; but Hemphill had all he wanted. I have saw the cattle east of the island. During high water Mud lake is quite a body of water; and when it is not high water, there ain't much of a body of water there. Mud lake is higher than Trumbull lake, and drains into Trumbull lake, which drains into the Sioux river. Trumbull lake and Swan lake are not connected.

Cross-examination:

The land between Trumbull lake and Mud lake is grass land—pasture land. When water was high the drain would overflow and spread over. The channel might be 8 or 10 rods wide when the water was high. There would not be much current; but it would naturally be running into Trumbull lake. I could not say what one of ten years I have seen it that high. It would be covered for a short time. The water might be six inches deep. I saw the grass growing near Schlosser's house yesterday. It was rather short. It was just a continuous wide leaved grass. The cattle had eaten the tops all off. That is what made it short. It was probably six inches to a foot high. There was slush water in the bottom. I should think probably it came out of the snow up there. It was not a continuous sheet of water. These bogs would stick up all over the tract. It is not very select pasture land. I suppose it could be used as meadow land if it was dragged down. I expect to have some land on the west side of Lost Island lake. I have squatted on the piece between what is supposed to be the meander line and the lake shore.

99

Q. And are one of the contestants the same as in this case?

A. You was kind of helping to run me off it.

Q. Yes, sir, I will do the best I can towards getting you off.

A. And I will do the best I can to stay, too.

Q. So you are interested in the same question that is involved in this case in your own case?

A. I don't know as my own has got anything to do with this case at all. It is similar to it, I believe.

ALEX HEMPHILL.

Am 64 years old; reside in Lost Island township, on a farm; am the father of W. L. Hemphill, the defendant. I live on section 20, township 97, range 34. I have known the condition of this unsurveyed land for ten years. The low land in section 30 is grown up with vegetation on most of it; grass, rushes; and a lot of it is timber and brush. The biggest part of it is grass. This vegetation has grown over it all the years I have known it. On the north one-half

of section 30 there is two lots that is good farm land. That is where the Beatty's live. The land between there and what is known as the island is swamp. I have been over the swamp land a few times. The land between the island and Schlosser's is swampy. I seen it covered with water last summer. Two years ago I walked across the low land. I assisted in building a shanty for Ed O'Neil. The low, swampy land on section 30 at that time was moist and soft. I was present at the time Hemphill and Ryan was building some fence, and had a conversation with Schlosser as to the building of a line fence.

100 Objected to as incompetent and calling for a conclusion and an opinion of the witness.

It was last year—1899—Mr. Schlosser and my son, Lee, were there, and Mr. and Miss Ryan were in the wagon.

Q. Now, in that conversation what was said between the parties there?

A. The conversation there was mostly with Mr. Schlosser and my son. It was about starting in to build a fence. It was the latter part of May, two or three days after Grout had been there and surveyed. My son said to Schlosser, "I will start the fence at that corner down beyond here, and fetch it up around this corner right here by his cow yard, and you can take it there and go on to the lake. Or, you can commence down there and fetch it to this corner, and I will take it from here to the lake." He then said there was a little differance in the distance; there would be a few rods difference in the distance from there here. They seemed to have the figures and know how it was. Mr. Schlosser finally says, "Well, then, I will build the west half from here on." Then Mr. Schlosser turned to me and asked if I would have any objections to his squaring out—squaring out his land some way. He meant he wanted enough land to square him up, enough of the homestead of Ryan and the swamp land. He did not say that he would be willing to pay for it. Lee Hemphill said that he wanted to build the fence right away; and after they had agreed on this certain corner, Mr. Schlosser said, "Go ahead, then, and I will take it when you get here." I assisted in building that portion of the fence my son agreed to build. Mr. Schlosser came out there to me. I was getting a couple of sticks. He helped me a little. This must have been about three days afterwards. Mr. Schlosser went to work and his man came with more posts and the wagon and him and me and W. L. went out to the next lot 16 or 18 rods. Mr. Schlos-
101 ser hunted a stick the surveyor had stuck and that the cattle had knocked down. Mr. Schlosser and Hemphill said that Grout had stuck the stick there. He found the stick. They were at work building the fence along the portion of land he had agreed to build. I remember a conversation that occurred between Schlosser and W. L. Hemphill at the store of Furlong & Berg, at Ruthven. Don't remember the date—some time in May, 1899. It seemed to

be about a fence my son had bought. He paid him the balance of the money—$20. They went back to make a receipt, back to a writing place in Furlong's store. They came back after a few moments. W. L. says: "Well, George, then it is all right," and George said, "Yes, you can go ahead." Schlosser went out of the store ahead and Lee went after him inside of a minute.

Cross-examination:

I think it was in 1898 that Ryan went on lot 12. It is my opinion that Schlos-er had possession of lot 15 in 1898. My son claimed to have bought it last spring, a year ago. I could not state where the fence was they were talking about in the store. It was a fence Mr. Schlosser had on this land somewhere.

Re-direct examination:

I came to northern Iowa in 1854; settled in Floyd county in 1854, and in Clay county about 25 years ago. I saw the land in and about section 30 and Lost Island lake. When I came into the country we passed through by the stage road. That was when I was moving from Floyd county to Clay county; I think 25 years ago the 29th day of last month. The stage road run right on the north shore of Lost Island lake, along the south side of the south half of section 30.
The road run right over the ridge. There was no connection
102 between Lost Island lake and what has been testified to here as "Mud" lake. From what I have known of the land since I saw it it is simply a general knowledge of the land in northern Iowa. I think Mud lake is in practically the same condition in the last ten years that it has been previous to that time as to overflow—some years more water, and other years dry. It depends a great deal on the amount of snow that fell in the winter and the rain fall in the spring. I am somewhat familiar with the outlet from Trumbull lake to the Sioux river. There is quite a descent. The water runs rapidly in the spring. I have been there fishing years ago.

Q. In your opinion, would it be, or would it not be, an easy matter to ditch out that drain successfully; drain Trumbull lake into the Sioux river by ditching the outlet of Trumbull lake?

Plaintiff objects as incompetent, irrelevant and immaterial; and he has not shown himself competent to testify.

A. Yes, sir; I presume it would.

Trumbull lake is northeasterly from the Sioux river. What has been testified to as Mud lake is south and east of Trumbull lake. I never saw Trumbull lake entirely dry. The fish would come up out of Trumbull into Mud lake in the spring in the first break-up. They were coming out of the outlet of the one and the inlet of the other where the water was running rapidly.

Re-cross examination:

I had saw Mud lake two or three times prior to ten years ago. I don't know that all of the lakes have receded in the last ten years. I don't suppose there would be as much water flow out during a year now as there would have been, take it as an average. There
103 used to be quite a large body of water in Elbow lake near Ruthven. It used to look as though vegetation grew stronger there.

By the COURT: No, no! Answer his question! He asks you if that has been dry in the last ten years. He ain't asking why that is true or is not true. He asked you if that is not true.

A. Not near all the time. It has dried up some.

HIRAM DAVS.

I live at Milford, Dickinson county; have lived there some 36 years. Came to this country 36 years ago last June. I was at Lost Island and Mud lakes the next July on a hunting excursion. There was some four or five of us. We were there nearly a week. We were on the island at that time; walked over from the south side. We were camped on the isthmus between Lost island and the lake. We took a notion to go over and explore the island, and walked over. I was shown the other day where Mr. Schlosser's house is. We camped on the premises north of Anthony's, and walked over from there to the island.

Q. What was the condition of that low land at that time?

A. We considered it a slough—a rush slough. We used to call it the Lost Island slough; grass, rushes, vegetation of different varieties growing there. Old grass on the ground under the fresh grass. The sod was thick and heavy. We could drive right across it with a wagon at that time. We drove about half way from the island behind Schlosser's house down across to the timber point with a pair of mules and a heavy wagon. Near to and east of the island and point the land was very near the same; a little more water on the north side than the other. I think there was bigger rushes and more grass.

104 Q. That is now called Mud lake? What was the condition of that?

A. There was not much water on the point of it; but after we come down to where the county line is below that there appeared to be more water. There was not so much grass and rushes down there.

Q. What is the fact as to whether there was grass and rushes all over it, or not?

A. Why, we supposed that there was nothing but grass; just a slough, rat houses occasionally where there was enough water to

make one or to have one. It is a very uneven piece of land—rolling; kind of mounds and sags in it.

Q. You mean that piece represented as a lake?

A. Yes, sir; up through there.

Q. What was the appearance of that place at that time as to whether there was a lake in there or not?

A. We didn't consider any lake in there.

We didn't consider it a regular lake. We didn't consider that in the lakes grass and rushes would grow to that extent. They were growing very nearly all over it. It was a good place for ducks and geese. We camped a little south of what has been designated as the "point." There is quite a high raise there, and we camped right on the bank of the slough. I next saw the ground about in October of the same year. It was about the same condition, but a little wetter. And then I saw it next about a year from that time. It was in very nearly the same condition then; perhaps a little wetter, or perhaps a little drier. I could not recollect; we had so many bad places and sloughs them days to contend with. I was teaming, moving trappers, drawing freight from Ft. Dodge, Webster City and De Moines. We had to get our flour at Webster City in the early seventies. Some years it was pretty
105 wet going through; more or less sloughs all over the country. We had to dodge them and work around them and go across them sometimes. There were years that the water was a good deal lower than it was at other times. When we had a heavy fall of snow or rain the sloughs would be full. When it would evaporate they would settle down. I could not say whether I saw the land around Mud lake during the seventies or eighties after they got the road through to Emmetsberg—the old stage road by Anthony's. We used to drive through that way. I think the old Milford route run up somewhere near Mud lake across the place of Hemphill. Some years that inlet there was pretty bad. Some years it was passable, so a team could draw a ton right through. Some years we would mow off grass and throw in and drive across. Other years it was pretty well dried out. Okoboji lake and East Okoboji lake I have seen the water there so no water ran down from that lake into the upper Gar—in those early years, the same years I am speaking about. During the time I have known this country there has been wet seasons and dry seasons. I saw this land on section 30 a couple of days ago. There is no such vegetation now at the present time; because it has been fed off and tramped down. There was more grass, more rushes and more sod on it when I first saw it. There has been cattle run over it. A man with a pair of rubber boots could walk over it now. I never saw any lake south of the island.

Q. And as I understand you, that ground in there that is now called Mud lake, when you first saw it, looked like a big slough?

A. Looked like a big slough; yes, sir; that is, all the upper part of it, toward the island.

106 Cross-examination:

Thirty-six years ago the first day of last June I came to Dickinson county and camped at Okoboji. I came there alone. I camped the same year in July near Lost Island lake on that bar. We were hunting duck and geese and elk and deer. None of us were living there at that time. We came from Spencer and drove around Lost Island lake. I am not positive as to the exact spot we were; but it was somewhere near there. I seen the land pretty well covered with water at the time of the big snow a number of years ago. The island was surrounded with water; but there was rushes and grass all over it. I think I quit freighting and driving around that lake in 1878 at the time they got the railroad to Sibley.

ED M'NALLEY.

Deputy sheriff of Palo Alto county. I remember the date of the snow fall in March, 1900. It was on the night of the 27th we had the heaviest snow. It started snowing a little in the afternoon of the 27th; snowed that night and on the 28th, and a little on the 29th. The 27th was on Tuesday. It seems to me the Sunday following the snow was about all off. I didn't make any measurements, but on Wednesday afternoon I drove out into Island township, and I thought it was about eight inches deep.

Cross-examination:

I have not noticed any difference in the volume of water in the creeks and rivers. They did not come up to the ordinary high water marks in the streams. The snow went off in about four days.

107 Re-direct examination:

There was a few places it drifted, so we had to leave the road; and when we got off the main traveled road and went through the low places, it was very heavy. I did't notice whether the melting of the snow raised the small ponds and low depressed places in the ground.

Defendants offer in evidence Exhibit "No. 2," being a plat of the additional surveys of sections 19, 20, 29 and 30, township 97, range 34, sections 25 and 36, in township 97, range 35, together with the surveys and letterings of the Commissioner of the General Land Office and the receiver of the United States land office at Des Moines, Iowa.

Plaintiff objects as being incompetent, irrelevant and immaterial, and it purports to be a copy, does not bear the official signature of any official of the Government, is not signed by any officer of the Government, it has not been shown that there is any such certificate, and the officers making such certificate had no jurisdiction, power or authority to make it.

Defendants withdraw that offer for the present.

E. B. EVANS.

I am attorney at law; live at Des Moines, Iowa.

Q. What connection have you had, if any, with the proceedings for the resurvey of what is known as the unsurveyed land in sections 19, 20, 29 and 30, township 97, range 34?

A. I was the attorney for the applicants, W. L. Hemphill, A. Hemphill, William and Edward Beatty, and acted as the swamp land agent for Palo Alto county, prepared the application for resurvey and secured the evidence that was submitted to the Secretary of the Interior.

The Commissioner of the General Land Office forwarded
108 the application to the Secretary of the Interior for instructions. I have seen the original decision of the Secretary of the Interior under date of March 8th, 1898. Exhibit "25" is a copy of that decision.

Objected to as not the best evidence, and as immaterial.

I know that the Land Department sent, or that there was a man on the ground making a survey; that, thereafter, there were plats filed in the local land office at Des Moines, Iowa, of the survey, and field notes filed with the secretary of the State of Iowa, and a decision on file in the local land office, of the Secretary of the Interior, of June 25th, 1898, approving the plat and field notes.

Plaintiff moves to strike out the answer as incompetent, irrelevant and immaterial, and stating secondary evidence.

I have inspected the original plat and field notes. Exhibit "31" is a true copy of the field notes on file with the secretary of state. Exhibit "2" is a copy of the original plat now on file in the office of the register and receiver of the United States land office at Des Moines, Iowa. I saw the man making the survey. He said his name was A. W. Barber.

Plaintiff moves to strike out the last statement as hearsay and incompetent.

I was there in April, 1898. There were two young men assisting him. I have been over the land a great number of times since 1897, and personally inspected it in procuring evidence for the application for resurvey and in arranging evidence in this case. I have seen the original plat of the resurvey. When the original plat was first filed in the local land office before the land was opened to entry, I personally made a copy of it, traced it on tracing paper;
have examined the original plat in the trial of two cases be-
109 fore the register and receiver, and have no doubt but that the plat Exhibit "2" is an exact copy of the original plat now on file, and it fairly and truly represents the land.

The defendants now renew the offer in evidence of the plat Exhibit No. "2," together with the certificate of the receiver of the United States Land Office and the Commissioner of the General Land Office.

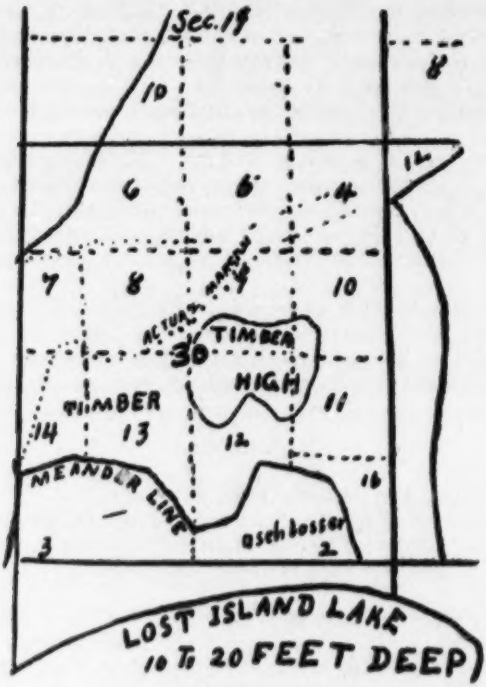
Mr. A. C. PARKER: Upon this offer I want to ask Mr. Evans, on cross-examination, one question.

Q. This blue print is simply a copy, is it not?
A. Yes, sir.
Q. And the certificate is a copy?
A. Yes, sir.
Q. It does not bear the true signature of the Commissioner?
A. The certificate of the Commissioner of the General Land Office is a copy; the certificate of the register of the United States Land Office is in his own handwriting.

Defendants' Exhibit No. "2" is objected to, that it does not contain the certificates of the officer in whose custody it originally was; the oral evidence and certificate of the register of Des Moines is only a point to establish or prove the genuineness of the plat; and that prior to the making of the alleged survey the Government of the United States had parted with its title to the south half of section 30 by regular patent, issued and delivered; and at the time this pretended survey was made the officers of the department had no power or authority over said land, and no power or authority to resurvey the same; and this is true whether the original survey and plat thereof was made through fraud or mistake.

110 EXHIBIT 2.

"The plat of additional surveys in sections 19, 20, 29 and 30, township 97, north, range 34, west; and in sections 25 and 36, township 97, north, range 35, 5th P. M., Iowa; (formerly erroneously included in Lost Island lake); authorized by the Interior Department March 8, 1898; scale, 20 chains to an inch; area, 1230 acres; surveyed by A. W. Barber, detailed clerk G. L. O., April 2nd to 20th, 1898, under special instructions from the Commissioner of the General Land Office, dated March 24, 1898."



"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C., *July 20th*, 1898.

111 The above map of additional survey in township 97, north, range 34 and 35, west, 5th principal meridian, Iowa, is strictly conformable to the field notes of the survey thereof, on file in this office, which have been examined and approved.

"BINGER HERMAN,
"*Commissioner and ex-Officio Surveyor General for Iowa.*"

UNITED STATES LAND OFFICE,
DES MOINES, IOWA, *May* 1*st*, 1898.

I hereby certify that this is a true and correct copy of the plat of additional surveys in sections 19, 20, 29 and 30, township 97, range 34; and in sections 25 and 36, township 97, range 35; made by A. W. Barber and filed in this office, August 30th, 1898.

"THORNTON S. HOWARD, *Register.*"

It is understood that each of the exhibits that are now offered may be offered and the objection made immediately after the offer of the exhibits; which are Exhibits Nos. "22" to "30."

Defendants offer in evidence Exhibit "22," being a copy of the contest docket of the records of the United States land office at Des Moines, Iowa, in the case of George Schlosser *vs.* Richard T. Ryan; involving lot 13, township 97, range 34.

(See Exhibit "G" of defendant Ryan's answer.)

Defendants offer in evidence Exhibit "23," being a copy of the records of the register of homestead entries of the United States land office at Des Moines, Iowa; showing homestead entry of Richard T. Ryan for lots 12 and 30, section 30, township 97, range 34.

(See Exhibit "A," of Richard T. Ryan's answer.)

112 Defendants offer in evidence Exhibit "24," being a copy of miscellaneous docket records of the United States land office at Des Moines, Iowa, of the filing of the homestead application of George Schlosser for lots 13 and 14, section 30, township 97, range 34.

EXHIBIT 24.

"Date of filing, August 30th, 1898, 9:24½ a. m.

George Schlosser, Ruthven, Iowa, lots 13 and 14, section 30, township 97, range 34, about 80 acres; held for rejection September 16th, 1898. Contest affidavit filed October 10th, 1898."

Defendants offer in evidence Exhibit "25;" the same being a copy of the decision of the Secretary of the Interior, March 8th, 1898, directing the survey to be made of certain unsurveyed lands in sections 19, 20, 29, and 30, township 97, range 34.

EXHIBIT 25.

"Secretary Bliss to the Commissioner of the General Land Office.

By your office letter dated January 26th, 1898, you transmitted for departmental consideration application for survey of certain lands situated in sections 19, 20, 29 and 30, township 97, range 34.

The application appears to have been served upon the owners for the lots bordering upon the lake. The applicants allege that meandering lines of said lake are wholly wrong; that the line established as a meandering line through sections 19 and 30, was from sixteen to forty-nine feet above high-water mark of said lake. That the meandering line on sections 20 and 29 is from thirteen to twenty-nine feet above high-water mark of the lake. That from the configuration of said land, there is not now, and was not at the
113 time of the official survey, any reason or facts that could possibly be construed as justifying the meandering lines as established. From the official plat of said township it appears that the lake extends into four townships; viz.: Townships 96 and 97, range 34 and 35, is about five and a half miles long, and from a half a mile to a mile and a half in width. The case of Grant *vs.* Hemphill, 92 Iowa, 218, is cited in brief of the counsel for the plaintiffs; which involves the greater part of section 19; wherein it was held by the supreme court of Iowa that the land "is not now, and probably never was any part of a lake." In Noyes *vs.* Collins, 92 Iowa, 566, the supreme court of Iowa held that the title of riparian owners does not extend beyond the natural shore. In view of the showing made and the decisions of the supreme court, it is deemed proper to institute an inquiry into the facts. You are, therefore, directed to send a special agent to the locality to make special examination into the land in question, the position of the lake past and present, and submit his report, when made, to the department."

Defendants offer in evidence Exhibit "26;" decision of the Secretary of the Interior of the United States, under date of June 25th, 1898, approving the survey as ordered in Exhibit "25."

EXHIBIT 26.

"The Secretary to the Commissioner.

March 8th, 1898, you were directed to send a special agent to the locality in question to make examination relative to the Government survey of land in the State of Iowa, situated in sections 19, 20, 29 and 30, township 97, range 34. On the request of your office, the department, March 17th, 1898, detailed Amherst W. Barber to make the examination and survey. In your letter of June 13th, 1898,
114 you transmit the report of Mr. Barber, dated April 2nd, 1898. Mr. Barber states that he has arrived at the conclusion that the land in sections 19, 20, 29 and 30, township 97, range 34, and a portion of the land in sections 25 and 36, township 97, range 35, were erroneously returned by the deputy surveyor in 1855, as covered by lakes. That there is no reasonable doubt that the pretended meandering of the lake was improper and almost wholly fictitious; and that the land should be surveyed and disposed of as public

land. With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, with a wet, marshy pond, called Mud lake, covering portions of sections 25 and 30, with an outlet going west into Trumbull lake. He also shows that there is a body of deep water in sections 31 and 32, township 97, range 34, separated from the land to the north by a sand ridge twelve feet high. From his report, it appears that there *has* been surveyed by him 1230 acres additional, 533 71-100 acres as swamp land, the remainder farming land. I see no reason why the survey executed by Barber should not be approved, and the land disposed of as Government land."

Defendants offer in evidence Exhibit "27," copy of list No. 64; lands reported as swamp and overflowed lands, together with copy of the certificates thereto attached, signed "Binger Herman, Commissioner and *ex-officio* surveyor general of Iowa."

EXHIBIT 27.

"List No. 64. Swamp and overflowed lands, within the meaning of the act of September 28, 1850, by the field notes of the surveyor, of April 2nd to 20th, 1898. Lots 11, 14 and 15, section 30, township 97, range 34."

Defendants offer in evidence Exhibit "28," certified copy
115 of approved list No. 41 of swamp and overflowed lands in sections 29 and 30, township 97, range 34, together with the certificates thereto attached.

EXHIBIT 28.

"Lots 11, 14 and 15, section 30, township 97, range 34," (with other lands).

GENERAL LAND OFFICE, DIVISION OF SWAMP LANDS,
WASHINGTON, D. C., *January 20th*, 1900.

This certifies tracts of land embraced in this list are claimed as inuring to the State, under the swamp land act of September 28th, 1850, that the character of the land as swamp and overflowed is established by the field notes of the survey of A. W. Barber; that the records of this office show no claims adverse to that of the State of Iowa, to any of the tracts described.

R. C. LEVY, *Examiner.*
SAMUEL W. SNOW,
Chief of Division.

January 22, 1900.—The tracts of land embraced in this list, Iowa swamp list, No. 41, are decided subject to the approval of the Sec-

retary of the Interior to be swamp land and to inure to the State under the swamp grant.

BINGER HERMAN,
Commissioner.

January 24th, 1900.—This list, Iowa swamp land list, No. 41, is hereby approved.

E. A. HITCHCOCK, *Secretary.*"

Defendants offer in evidence Exhibit "29," being a copy of the contest docket of the records of the United States land office,
116 Des Moines, Iowa, in the case of The State of Iowa and Palo Alto County *vs.* J. W. Smith *et al.*, involving titles to lots in section 30, township 97, range 34, (with other lands).

EXHIBIT 29.

"Lots 11, 14 and 15, of section 30. State of Iowa and Palo Alto County *vs.* J. W. Smith *et al.* The parties mentioned in the title of this case having filed non-swamp land affidavits, hearing was ordered October 28th, 1898, by the register and receiver, to determine the swampy or non-swampy character of the land, hearing to be held on September 8th, 1898. April 3rd, 1899, the register and receiver rendered their decision in favor of the State and Palo Alto County. Case reported to General Land Office June 1st, 1899. June 13th 1899, Commissioner rejects all claims adverse to Palo Alto County, and closes the case, except as to lots 14 and 15, section 29."

EXHIBIT 30.

Defendants offer in evidence Exhibit "30," being a certificate of Thornton S. Howard, register of the United States land office at Des Moines, Iowa, that the foregoing Exhibits "22" to "29," inclusive, are true copies of the records of the United States land office at Des Moines, Iowa.

Plaintiff objects to Exhibits Nos. "22" to 29," inclusive, and to each thereof separately, for the reasons urged in objections to Exhibit No. "2." And further objects to the exhibit with reference to the contest with Schlos-er, that it is immaterial and irrelevant; and that said proceedings, if any, does not constitute an estoppel against the plaintiff, nor bar him from insisting upon his title obtained from the chain of title alleged and proven in this case; and
117 objects to the copy of the decision of the Secretary of the Interior for the additional reason that it is simply a copy made by a person or officer not having the custody and control of the original decision; and the same objection to the copy of the decision of the Secretary of the Interior of June 25th; and objects to

the copy of swamp land list as incompetent, irrelevant and immaterial, and not certified to by the officer having charge of the original list; and the certificate is not competent to prove or establish such list. And makes the additional objection to the copy of the contest that was made to the application and records of the contest of Schlosser.

Defendants offer in evidence Exhibit "32," being a copy of the decision of the Commissioner of the General Land Office, rendered on the 13th day of June, 1899, in the case of The State of Iowa and Palo Alto County *vs.* J. W. Smith, *et al.*, involving lots 11, 14 and 15.

EXHIBIT 32.

"Decision of the Commissioner of the General Land Office, under date of June 13th, 1899. On appeal from the decision of the register and receiver of April 3rd, 1899; approving their decision and holding lots 11, 14 and 15, section 30, to be swamp and overflowed lands."

Defendants offer in evidence Exhibit "33," copy of decision of the register and receiver of the United States land office at Des Moines, Iowa, in the case of George Schlosser *vs.* Richard T. Ryan, involving lot 13 of the Barber survey, in section 30, township 97, range 34.

EXHIBIT 33.

"The land is a part of the tract of 1230 acres in Palo Alto
118 county, opened to entry August 30th, 1898. On opening day the following persons made application in the order mentioned, each applicant including the lot in question: Richard T. Ryan, Ruthven, Iowa, lots 12 and 13, section 30, township 97, range 34; application filed at 9:10 a. m. George Schlosser of Ruthven, Iowa, for lots 13 and 14, section 30, township 97, range 34; application filed at 9:24½ a. m. George Schlosser was notified September 16th, 1898, that his application conflicted as to lot 13 with the entry of Richard T. Ryan; and as to lot 14 with the swamp land selection of Palo Alto county. As to lot 13, he filed affidavit of contest October 10th, 1898. October 27th, 1898, the register and receiver ordered a hearing to be held before them at the United States land office at Des Moines, Iowa, on December 7th, 1898. George Schlosser appeared in person and by his attorney, J. F. Conrad. Richard T. Ryan appeared in person and by his attorney, E. B. Evans. Each submitted their evidence, and the taking of testimony closed. From the evidence we find that George Schlosser lives on lots 2 and 3, section 30, township 97, range 34; that the lot in question, together with lot 14, adjoins his farm on the north, and that Schlosser's application for lots 13 and 14 was for an adjoining farm homestead.

Concerning Richard T. Ryan, we find that he is a citizen of the United States. That on August 5th he bought of one Ed O'Neil a house on lot 12; that he moved into said house on August 8th, 1898. He being qualified to enter said tract under the homestead law, and being a resident on the land in question at the time said land was opened to entry, and having made the first filing on opening day, we see no reason why his entry should be canceled. The entry of Ryan will remain intact, and the application of Schlosser be rejected. Thirty days were allowed to appeal to the Commissioner of the General Land Office."

119 Defendants offer in evidence the certificate of Thornton S. Howard, register of the United States land office, that the foregoing Exhibits "32" and "33" are true copies of the original records of his office.

The plaintiff objects to each of said exhibits, "32" to "33," inclusive; and makes the objection to each separately, the same as to Exhibit No. "2," and to each of the exhibits "32" to "33," inclusive.

P. V. HAND.

I am county auditor of Palo Alto county.

Q. Examine Exhibit 2 and Exhibit 31 and state whether or not they are documents on file in your office, in the office of the auditor of Palo Alto county?

A. My filing don't appear on these, but those papers have been on file in my office since about May, 1899—both of those exhibits.

Cross-examination:

Q. They never have been filed there, have they?

A. Yes, sir; I sent for them, myself.

I sent for those papers at the land office. The plat, I believe, is certified to. I don't believe I sent to the secretary of state for Exhibit 31. I don't know as I sent to the secretary of state; I believe I sent to the land office at Des Moines; and Exhibit 31 is that copy. It has not been in my office all the time. I gave it to Mr. Moreling the other day.

The defendant renews the offer of Exhibit No. 2.

The plaintiff makes the same objection to Exhibit No. 2 as heretofore made.

120 The defendant offers in evidence No. 31, being the copy of the field notes of the A. W. Barber survey of the land in sections 19, 20, 29 and 30, township 97, range 34, certified to as true copies by G. L. Dobson, secretary of state.

The plaintiff objects for the reasons assigned for objections to Exhibit 2 and Exhibits 22 to 30, inclusive; and that exhibit is not certified to by any officer having the custody and control of the

original field notes. It is not certified to by the Commissioner of the General Land Office, but is simply a copy made by the secretary of state of the copy of the original field notes, and is secondary evidence, and incompetent and not the best evidence.

EXHIBIT 31.

Chains.

80.25 Intersect accepted cor. of sec. 19, 24, 25, 30 an oak stake marked 24 in., old mound 1 ft. high and small pit W. fences corner here at base of hill and edge of heavy grass flat dry. High prairie farming land 79 chs.

.....

Thence south bet. secs. 25 & 30. Entering marshy ground, heavy grass and 3 inches water in some small places.

20.00 Rise 2 ft. to sand ridge, brs. nearly E. & W.

24.40 Top of ridge, No evidence of a M. C. found.

.....

21.00 Margin of water. Coarse grass, weeds, fences and musk rat houses all over Mud lake showing uniform shallow water and level bottom. Estimated depth 1 to 1½ feet.

.....

43.00 Cross roads bears S. 80 degrees E. about in front of Schlosser house.

44.35 Top of swell by fence and descent in corn-field.

121

54.00 Dry marsh pasture and knolls thence level

65.42 Set temp. M. C. in level pasture. No signs of old corner.

72.06 Intersect fence corners of sections 29, 30, 31 and 32. Here I find an old stake or post 2½ in. square 2 feet above the ground, set in frozen soil well seasoned burr oak. heart wood bearing marks nearly erased by weather, showing curves of a marking gauge, and in three places the central point or hole made in the center of the curve is visible. The marks seem to read S. 32 on one side, no marks apparently on the other. Mr. John Crookshank testified to me his opinion of the identity of this post as a mark set by the original surveyors and I accept it as such. See copy of affidavit attached to this report page 22.

.....

Begin at cor. of secs. 19, 20, 29 and 30 and run S. 88 deg. 37 min. W. bet. secs. 19 and 30 across dry marsh.

5.75 Open water of the "inlet" 50 lks. wide, thence on solid flat.

16.00 Ascend gentle slope.

30.00 Top of broad ridge 10 ft. high. Descend.

34.00 Enter marshy grass flat.

40.00 Drive oak stake in bottom of hole to depth of 4 ft.

45.00 Leave flat ascend beach 25 feet
48.00 Top of same, brs. N. & S.

.....

69.30 I drive to shore of Lost Island lake, south of cor. of secs. 29, 30, 31 and 32 and use leveling rod. Find the sand ridge of north shore is 12 to 14 ft. high above water level and the marshy ground at said sec. cor. is 9 7-100 feet above level of said lake.

122 Proceed to the outlet of Mud lake in sec. 25 and set instrument in graded road near bridge. Telescope is 9.95 ft. above water level of Mud lake and 9.02 ft. above bottom of dry run or natural ditch 2 to 5 ft. wide on west side of road. Hence a rise of 7 inches in the pond would cause water to flow in said outlet, westward and a rise of two feet would cover the broad grassy flat on each side of it west to Trumbull lake.

.....

Begin at cor. of secs. 29, 30, 31, 32 and run south bet. secs. 31 and 32 across a level bottom.
3.78 Leave black muck land and ascend sandy.
4.00 Road bears E. & W. ascend to plowed sand flat.
4.50 Sandy plateau—cultivated—10 feet high.
6.28 Brink of narrow ridge 12 to 14 ft. elevation, Descend over sand and gravel.
6.90 Water of large deep lake.

.....

General Description.

After careful examination I report my opinion that the tracts which are more than one-half swamp and overflowed land within the meaning of the act of Sept. 28, 1850, are as follows:

In sections 29, lots 12 and 13.
" " 30 " 4, 6, 7, 8, 9, 10, 11, 14, and 15.
" " 25 " 6, 7, 8, 9, 10.
" " 36 " 8.

The other tracts are either *all* or more than one-half good high farming land, free from swamp and over-flow.

All the land surveyed, except the marsh of Mud lake are considered worth from 20 to 25 dollars per acre.

A. W. BARBER,
U. S. Surveyor.

123 BELA RYAN.

Live on lot 7, section 36, township 97, range 35, in Clay county. Have lived there going on two years. I am a sister of Richard Ryan, and sister-in-law of W. L. Hemphill. I am familiar with the south half of section 30. Richard Ryan has lived on lots 12 and

13 about two years. I have frequently been with him to his place, sometimes been there three or four times a week. Have traveled across from his place with him with horse and buggy—traveled west and northeast. When we traveled west we went across a ravine over lots 13 and 14. In going northeast we would go on across lots 9 and 10 and lot 4. I have crossed that ground a number of times. It was generally quite dry. Sometimes it would be wet. We never got swamped. The land south of the island was generally wet; but not so but what we could cross it riding back and forth. I was with Mr. Hemphill when he and Mr. Schlosser had a conversation in regard to the sale of a fence. The first talk was about the 20th of April last, in Mr. Schlosser's yard. Mr. Hemphill and Mrs. Hemphill and Mr. Schlosser and myself were present. I believe Mrs. Schlosser was outside the door. They were going to look the fence over at some future time, and would sell the fence when they looked it over. I was present at an interview later. A few days after Mr. Hemphill, Mr. Schlosser and myself were present. Mr. Schlosser said that they would not have any trouble in selling the fence; that Hemphill had the land, and he would sell them the fence. They would have no trouble in selling the fence, as the fence was on Hemphill's land. Schlosser said that. That is about all they spoke about the price.

Plaintiff moves to strike out the conversation as to who had possession of the land, as being incompetent and a conclusion of the witness.

124 Cross-examination:

I settled on lot 7 in Clay county, part of this unsurveyed land. I homesteaded it. I don't know as I am interested the same way my brother is. I am trying to keep my homestead. I am living on it. This fence was on the land Mr. Hemphill had bought from the county. Mr. Schlosser claimed to own it. I didn't hear any talk about anything else being sold at that time. I didn't know of anything else being sold. All that he said was that Hemphill now had the land, and he would sell him the fence. I think the conversation about the fence was in April, 1899.

Re-direct examination:

I live on lot 7, section 36, township 97, range 35, as shown by Exhibit 2. I have been served with notice of a suit by Mr. Schlosser claiming that land. He is also claiming lot 8, next west of me. He has brought suit in Clay county claiming both these lots.

Re-cross examination:

He don't claim those lots over there as a part of his land in section 30; claims it in Clay county. I presume he owns land in Clay

county. I took lot 7 as a homestead; claim it is unsurveyed land, because the meander line runs south of lot 7.

W. L. HEMPHILL, recalled.

I know of the resurvey that was made by Barber; was present during a part of the survey. I have seen the plat of his survey. Exhibit 2 is a copy of the plat. The principal part of lot 15 on section 30 of this plat, Exhibit 2, is swamp land—
125 marshy grass land. It can be used for pasturing and mowing purposes, for grass and hay; could have been so used ever since I knew it. Lot 11 is principally the *the* same, it may be a trifle wetter than 15; been pastured the last ten years to my knowledge. No seasons since I have known the land in those lots but what they were capable of being so used. The land south of the island on lot 12 is similar to that of lot 15. It can be used for pasturing and mowing. I should think somewhere about 12 acres of lot 12 is subject to overflow and about 40 acres is not subject to overflow. I should judge about 15 acres of lot 13 was subject to overflow. Lot 14 is a little wetter than those other two; 10 or 12 acres of high land on lot 14. The balance of the lot is growed up to reeds and rushes, and not susceptible of any use the biggest part of the year. I know what is commonly designated as Mud lake. There is no part of it on lots 11, 12, 13 and 15. There is a part of it on lot 14; somewhere from 14 to 16 or 18 acres. Lot 10 has always been used ever since I lived down there. Prior to that it was used a number of years I know of.

By the COURT:

Q. What for?
A. Pasturage.
Q. What is it used now for?
A. Pasturage.
Q. Ever been used for anything else?
A. Yes, sir; there has been hay cut on it.
Q. Ever been broken up or tilled or cultivated?
A. No, sir; it has not, that I remember of.
Q. When was hay cut on it?
A. I could not say what years; but I was over there once when Mr. Cruickshank had hay on there.
Q. How much?
A. They had a couple of stacks in there. I don't know
126 just how much hay they did cut; it partially came off from lot 11.

Lot 9 has some dry land, and it has got some a little wetter yet. Mud lake comes on lot 9. Lot 8 catches what is known as Mud lake in Palo — county. I saw the principal part of lot 8 in crop; and lot 7 was in crop the same year. Lot 4 can be used for pasture land

or meadow. I have known of it being pastured for 17 years. Lot 5 has about 21 acres high land; the balance is low. The low land is good for pasture or mow land. Lot 6 is a trifle wetter than 5; has not quite so much high land; about 16 acres can be cultivated. The principal part of the balance can be used; a little bit in the corner of that is grown up to reeds and rushes. What is known as the unsurveyed land in sections 20 and 29 is high, dry, rolling prairie land. There is no lakes or any indication of any lakes on any of that land. Part of the unsurveyed land in sections 25, 36, township 97, range 35, is rush land, rush ponds, and part of it is high, dry land. Exhibit 2 correctly shows the outlines of what is practically known as Mud lake. I have seen the lake dried out. In the fall of 1891 was the first time I saw it dry. Again it was dry in 1894 and 1895. I claim lots 11, 14 and 15, in section 30, township 97, range 34, by purchase from Palo Alto county under the swamp land title. I also bought the right of the swamp land agent, and have his interests. I had an interview with Mr. Schlosser with reference to the purchase of the fence that he had on this land that I now own. He owned the fence that starts in at the southeast corner of section 30, and runs north to the next section corner and a little east of the half section corner; it starts there and runs northwesterly over to the southwest corner of lot 4, then down across the half section line on the west, then south to the meander corner. The first interview I had with him was about April 15th, at his
127 place. I drove up there one evening and told him I had bought that land. I wanted to put in a fence or else buy his fence. He told me he would sell his fence. If I had bought the land he would sell me the fence. After that I went around to his house, and we figured up the amount of the fence, and it came to something like $22.00. He said, "I will have to have $25.00 for that fence." I said, "I will give you $25.00;" and I gave him $5.00. I told him when we drew up a writing in regard to the fence I would pay him the balance that afternoon, in town, which I did. He consented we should describe the fence and the possession of the land. And we went into Mr. Furlong's——

By the COURT:

Q. Yes, but what did he say?

A. I says We will describe the fence and the possession of the land; and he says All right, so we went, and I drew up the writing, and I read it, and Mr. Schlosser took it and he read it, and then he signed it and handed it back to me.

Mr. Schlosser had occupied the land the year before. I drew up receipt, Exhibit 3, on Mr. Furlong's desk, in Furlong & Berg's store. Schlosser was right there. I read it over to him; he took it and looked it over, and signed it and handed it back to me. The last words were there at the time he signed it. Nothing has been added to it since. I had had a talk with him about possession. He didn't say possession at the time Mr. Ryan and I went to sow our oats

some time in April. Schlosser had forbid our going across the land. I said I suppose we will have no trouble in regard to the fence. He said, "No; you own the land, so we will have no trouble in regard to the fence." Schlosser and I agreed to get Mr. Grout. He said for me to send for him and he would pay half; and we would have the meander line run, and put in a division fence. I told him all right, I would do it. I got Mr. Grout; Schlosser furnished a Mr.
128 Rhinehart. The meander line was run. I had a conversation with Mr. Schlosser about dividing up the fence. We went over to build the fence; drove around by Schlosser's. I asked him what part he wanted to build. He said it didn't make any difference to him: I told him I would build the east part of the fence as the west part bordered up close to his house. He said All right, go ahead; I will put in my fence and will take it when you get here. Mr. Ryan and I built the east half. Mr. Schlosser built about 30 rods from the division point west. He has built no more. I have spoken to him about it since. He said he would build it right away. It run along to the last days of June or July; I said to him, "You haven't put in your fence yet." He said, "I will put in that fence as quick as I hear from the land office at Des Moines." I said, "That ain't what you agreed." He said, "That is what I'll do." Later on I spoke to him in regard to it. He said he would put it in when he got a decision from the United States land office. I said, "That ain't what you told me the other day." He said, "I think it is." I said, "You told me you would put it in when you got the decision from the register and receiver." He said," "I haven't got that yet." I said, "Don't you know that decision is given?" He says, "I haven't been advised so." I said, "You will never get that land, anyway." I told him he could not acquire an additional farm homestead for the reason that he owned 232 acres of land; that I had been told so. He said that his attorneys never advised him so. Later on in the fall I spoke to Schlosser about building the fence again. That was at the time my cattle were getting in his corn. I told him that if he didn't build that fence that I would build it right away. I put in the posts that day and the day after. I and Mr. Ryan have been in possession of the land north of the meander line. I am somewhat acquainted with Trumbull lake and with the outlet of Mud lake into Trumbull lake. Mud lake is higher
129 than Trumbull lake. The outlet of Trumbull lake is in the Sioux river. I think a ten foot ditch dug three miles toward the river would drain Trumbull lake, and would keep it drained at high water stages. It is about a half mile from Mud lake to Trumbull lake; and a five foot ditch from Mud lake to Trumbull lake would drain Mud lake entirely, and keep it drained. I have made an examination since I bought this swamp land with a view to draining it. That is my signature to Exhibit 35. It is the contract of purchase that I made with Palo Alto County for the land in controversy.

It is agreed that Exhibit 35 is a part of the records of the auditor's office of Palo Alto county without further identification.

The defendant offers Exhibit 35 in evidence, and asks that a copy of the same may be made in the record.

Plaintiff objects to the offer as irrelevant and immaterial.

EXHIBIT 35.

Contract of sale by Palo Alto County of lots 11, 14 and 15, section 30, township 97, range 34, to W. L. Hemphill.

The defendants offer in evidence Exhibit No. 3.

EXHIBIT 3.

(See amendment to answer of W. L. Hemphill.)

Objected to as irrelevant, incompetent and immaterial, and if a genuine instrument would be wholly immaterial to a well plead issue in this case. The receipt simply calls for the possession of the land; nothing in the receipt contained which relates to the title to the land. It is too indefinite and uncertain. It does not describe any land.

130 Cross-examination:

I have had no experience in draining large bodies of water. The Sioux river is about twelve miles from Trumbull lake. I think the ditch would have to be dug about three or four miles. I think the expense of digging such a ditch would be about $600. It would have to be dug about ten feet deep. I don't know what the expense would be. The soil of Trumbull lake is black, muddy soil. Some of it is yellow clay.

I bought this land from the county on the 15th day of April. I bought an undivided half interest from the county. I bought the other undivided half interest in August, 1898. I have a copy of that contract. I bought the other undivided half interest from Mr. Evans for $985; and from the county I bought the undivided half interest for $900. I hold those two interests subject to some money I have borrowed. I am relying on those two contracts and this resurvey for my title. I didn't say anything to Schlosser when I bought Mr. Evans' interest. The first thing I said to him about possession was after I bought from the county. I told him I had bought all the land and wanted to buy the fence. He said that we would go and measure the fence any time it was convenient. Mr. Schlosser looked dazed for a moment and said, "Well, well!" and said, "If you have bought the land I don't want any trouble and I'll sell you the fence." And when I bought the fence I told him I

would give him $5 then, and pay him the balance that afternoon in town when we drew up a writing. I wanted a writing to show that he had given me the fence and possession without any trouble. When I went out there I had a doubt that he would possibly not give up possession. But he did give up possession. At that time Mr. Ryan claimed to own and be in possession of lots 12 and 13.

I had specified that I had bought the swamp land. I con-
131 sidered the possession of lots 12 and 13 was in Mr. Ryan.

I suppose I sat there at the desk in practically the same position while I was writing Exhibit 3.

Q. How did it happen that the general slant of all these let-ers was on an incline, and "for possession" is writ-en almost perpendicular up and down the page?

A. I don't know how that happened. I wrote it all the same.

Q. You didn't stop to change your position, did you?

A. I don't know whether I did, or not.

Q. What was that conversation in the store when you went into the store to draw up this contract?

A. I brought him the money, and told him there was the other $20, and I said We will go over to the desk and draw up a contract describing the fence and possession.

Then we went back to the desk and I commenced drawing that up and writing out; wrote right along. I think we had a little discussion in regard to interlining, about the Cruickshank part of it. I had got it writ-en up, pretty much all written when Schlosser said we didn't describe the two wires on the part of the fence bordering up to Cruickshank's. I have been acquainted with this land for 20 or 25 years. Have been around there quite a good many times before 1890 hunting and fishing.

Q. What kind of banks are there on the north side of Mud lak[illegible]

A. There is a strip over the county line in which there is a k[illegible] of a ridge. I would not really call it a bank, about 15 or 20 rods long. There is not much of a bank to the rest of Mud lake.

Q. How do you distinguish between Mud lake proper and the balance of the land there?

—. There is a kind of a second bottom, and a hill out north in section 30, probably four rods. There is a kind of a flat about 40 rods when you leave the high land.

132 Q. What is it that distinguishes the line between Mud lake proper and lot 11?

A. Well, there is no lake on the east of the island whatever.

Q. What is there to distinguish between lot 8 and Mud lake proper?

A. There is a kind of a ridge rounding out there, or point of timber; kind of runs out northeast a little.

Q. And the south half of lot 9; what is there to distinguish between that and Mud lake proper?

A. The extension of this island on lot 12 extends out about 40

rods across lot 9, then it runs out into this one again for a ways. It is fair sod. And then it runs into these reeds.

Q. There is a strip of low land between lots 13 and 12, isn't there, according to this blue plat No. 2?

A. Yes, sir.

Q. What is there to distinguish between that low land in the inlet from the bed of the lake proper?

A. There is a little raise out on lot 8 that is a couple of feet higher.

A ridge of earth, vegetation and grass on it, grass and weeds. I testified in the case of Grant and Eaton *vs.* Hemphill.

Q. You testified, didn't you, to-wit: Q. What do you say with reference to the shore of these lakes on the north side being well defined, or not? A. It is pretty well defined with the exception of where the inlet comes in.

A. I answered that question, undoubtedly.

I also testified that I had had business over to Lost Island lake and Mud lake; that I went fishing many times, and that I had went there hunting, and that we generally fished on Trumbull lake and Palo Alto lake. That was the general fishing ground in the spring of the year, the outlet between Trumbull and Mud
133 lake. I said the water on these lakes are about the same now as they have been during ten or twelve years, and my statement in that respect is entitled to as much credit as anything I have sworn to. I testified in the Grant-Eaton case that the banks of Mud lake, or the ridge, was about 17 feet high.

Re-direct examination:

I wrote the contract about the fence, and when I had wrote most of it, Mr. Schlosser called my attention to the two wires on the Cruickshank fence. I stopped and talked it over and said We can interline it. Mr. Schlosser proposed that we either tear it up and write a new one, or interline it; and so we interlined it. We might have stopped and talked about it several times while I was writing it.

Re-cross examination:

I could not say whether I wrote all of it before we stopped and discussed it and interlined it.

Defendants now offer from transcript, Exhibit 36, being a transcript of the testimony in the case of George Schlosser against Wallace Cruickshank in the November term of 1893 of this court, being so much of the testimony of James Spaulding in the cross-examination of James Spaulding on the witness stand, containing pages 71 to 79 inclusive, of said transcript.

Plaintiff objects to the same as incompetent, irrelevant and immaterial, and not tending to impeach the witness; and we object to it unless the whole of his testimony is offered.

EXHIBIT 36.

My name is James Spaulding. Mud lake is shallow. I am acquainted with the south half of section 30, Lost Island township; have known it since 1871. Have seen cattle grazing there.
134 Teams can pass over the cultivated land to the timber beyond. I have seen it when we could walk across there in the summer time. I was there once when one portion of Mud lake was dry. I have seen the portion lying at the south half of 30 dry, completely dry, three or four years ago. I was over it this fall. It is practically dry now. The center of the lake is dry enough so that stock had food in there during that summer, also food on the east. During all the time I have known Mud lake it dries up and fills up just the same.

Defendants, as a part of the re-direct examination of Mr. Hemphill, offers in evidence Exhibit 37, being a copy of a letter under date of February 15th, 1899, addressed to the county auditor, Emmetsberg, signed E. B. Evans, the original of which is now on file with the county auditor.

Plaintiff objects to the letter as irrelevant and immaterial.

EXHIBIT 37.

Letter notifying county that E. B. Evans has sold his interest in the land to Hemphill and directing the county to recognize him.

(Signed) E. B. EVANS.

Defendants offer in evidence Exhibit 39, being a copy of the contract entered into on the 2nd day of May, 1898, between the board of supervisors of Palo Alto county and E. B. Evans.

Plaintiff objects as immaterial and irrelevant, and does not carry and convey any title.

EXHIBIT 39.

Written contract between Palo Alto County and E. B. Evans, authorizing E. B. Evans to represent the county in applying for a survey and selection of swamp land in sections 29 and 30,
135 township 97, range 34, and providing for a compensation for his services of an undivided one-half interest to all swamp lands patented to Palo Alto County.

Defendants offer in evidence Exhibit No. 38, being an assignment of the contract mentioned in Exhibit 39, under date of August 24, 1898, the original of which is on file with the cou-ty auditor of Palo Alto county.

Plaintiff objects as immaterial and irrelevant, and that the same does not carry or convey title.

EXHIBIT 38.

Assignment of contract, Exhibit 39, to W. L. Hemphill, executed by E. B. Evans, directing the county to recognize Hemphill as successor in interest to the interest of E. B. Evans in the swamp lands in sections 29 and 30, township 97, range 34.

(Signed) E. B. EVANS.

Defendant offers in evidence Exhibit No. 40, quit claim deed executed by E. B. Evans and N. E. Evans, his wife, under date of the 23rd of August, 1898.

Plaintiff objects as being immaterial and irrelevant, and does not carry or convey title.

EXHIBIT 40.

Quit claim deed conveying lots 11, 14 and 15, section 30, township 97, range 34, with other lands, to W. L. Hemphill.

(Signed) E. B. EVANS AND WIFE.

Plaintiff offers in evidence from the depositions taken in the case of John D. Eaton *et al.*, *vs.* W. L. Hemphill in the district court of Palo Alto county on the 21st day of August, 1891, the entire cross-examination of said Hemphill, deposition being testified to as Plaintiff's Exhibit P.

Defendants object to the same as being incompetent and
136 immaterial, and for the further reason that the witness, Hemphill, admitted the testimony was given in the cross-examination that was propounded by the attorney for the plaintiff, and that the same does not tend in any manner to impeach his testimony given upon the stand.

EXHIBIT P.

I went fishing on Lost island and Mud lake a good many times. Also went hunting there; could not tell how often hunting; all kinds of game. We generally fished on Trumbull and Palo Alto lake. Generally followed the outlet of Mud lake and fished along there. Also fished in Okoboji lake and Lost Island lake.

Have known the land for ten or twelve years. The water is about the same now as it has been during those ten or twelve years. The north bank of Mud lake is tolerably high. It is about 17 feet above the water, that ridge of land that comes down from the supposed section line. I am talking about the ridge of land that runs up on section 19 and clear across 20. I don't call that the bank of Mud lake. I did not say the bank was 17 feet high; I said this ridge of land was. If I said the bank I meant the ridge. Q. Then we *we* will talk about the shores of Mud lake. What kind of land is there

there? A. Some places, as I said before, it is dry land, and some places it is not. Q. How high is the north shore of Mud lake above the water? A. Well, it varies. Q. From what? A. All the way up to 17 feet. Q. You still say that the shore of Mud lake is 17 feet above the water? A. No, sir; I say the northeast corner of Mud lake is 17 feet above the water. Q. You have reference to the northeast corner as designated on the map? A. Yes, sir; right along there (indicating on plat) that is, I should judge, from ten to fifteen or twenty feet along there.
137 I am referring to the land north of the meander line. South of it is supposed to be lake. It is kind of lowish along here, (indicating on plat); and this here is dry land. Q. When you get on the edge of the lake, how high is the edge of the lake above the water? A. I should judge about five feet right there. It runs about so until you get, I should judge, about 15 rods east. Then it runs down to kind of flat land. I could not say how high the flat land is above the lake. I ran right straight through. There was dry land below there. It was in September of 1890 that I ran through. Q. Immediately northeast of the lake, how does it compare in that day with the level of the lake? A. It is higher than the lake, probably between four and five feet; that is, at the section line. Q. You never saw the waters of Mud lake any higher than they were a year ago? A. I may have seen them a little higher at times, but not much, just about the same. In the spring of the year they might be a little higher.

LEROY GROUT, recalled on behalf of the plaintiff.

As near as I can tell there was a well-defined bank along the north and east portion of the timber point on the west of section 30, but I don't think at any point along there it was very abrupt. I think it is about 30 rods between the bank of the timber point and the bank of the island at the line A A.

Q. Now, you examined Exhibit 21, examined the same point as indicated on that plat. I will ask you whether, when you made that survey, there was any narrow channel there between the same points, that is, A to A, on Exhibit G, as represented on plat 21?

A. At the time I was there I did not notice anything of that nature. It was covered with water and slush ice. I did not observe a narrow strip of dry land as indicated by the black lines.

I meandered along water when I made plat Exhibit G. Some of the time the chain men were in the water. I meandered
138 out on the surface of the end on the south half of section 30; the meander lines and corners as meandered by Barber.

Q. You may state how, and in what respect, the survey of Barber corresponds with the meandering of the survey in 1857, and whether or not any part of the land included in the meander line of the original survey is now included in a portion of the lots platted by Barber?

Objected to as not the best evidence, and as incompetent and not rebuttal.

A. The only way that I can answer that is, that it was impossible to retrace the original Government meander lines, but from an observation and resurvey of the line run by Barber, and by comparing with the original the Government field notes, I should say they do not agree exactly. The starting point to Barber's survey is further east on the line between sections 30 and 31, than the one as indicated on the original survey. The angles are at variance but very little, but the difference between the meander corner and the corner in the bog, is not as much as indicated in the original survey. There is a difference of 3 chains and 8 links. Right north of Schlosser's house I meandered by Barber's runs in the timber, back of Schlosser's house about 50 feet from the bottom of the bank along slough or lake. It runs about 30 rods on the slope of the bank, taking in a part of Schlosser's timber. As near as I could determine when I tried to run the original meander line it would run through the slough quite a ways north of that. My computation of the number of acres left to Mr. Schlosser by Barber's survey would be 98 and 50-100 acres.

Objected to as not the best evidence.

Cross-examination:

139 I made these computations yesterday from the notes I had of Barber's when I run those meanders for Hemphill, and from the distance given on plat Exhibit 2. I started from the meander corner between sections 29 and 30, computed those angles around to the meander corner on the line between 25 and 30, then down from there to the section corner on the southwest of 30, then back to the point of beginning.

Q. Taking the plat, Exhibit 2, state what distance you computed between the south line of section 30, and the irregular meander line along the north of lots 2 and 3, and between sections 29, in township 97, range 34, and section 25, in township 97, range 35?

A. I took those distances as I had them from Barber's report. Those distances are not shown on Exhibit 2. The only distances shown are on the west side and south side of section 30. The distances are shown by the field notes.

The first course I took, starting from the meander corner between sections 30 and 31, was north, 19, ¼; west 18 chains and 30 links; the next course was north 81, ¾ west, running up over this ridge 14 chains and 66 links; the next course was south 21½ degrees west, the next was south 71 degrees west, 7 chains and 80 links, or 514 and 8-19 feet; it was measured with 100 feet steel tape, and is figured by multiplying by 66; the next course was north 39 degrees west, and 15 chains, or 990 feet; this course to here from the edge of the timber up into the slough, as I said, the water was so deep my men located the point there, and then by triangulation I had to determine my line from that. On the first day my men made a

mistake, and I re-run the line, and the next morning determined that he had made a mistake. I then adjusted my instrument on the west shore of the slough to get in line according to direction, on the west shore of the slough that runs down through lot 13, down back by Schlos-er's house. I adjusted myself to that by sighting up, and getting the true angle according to the field notes. I
140 placed myself on line with my instrument, and surveyed the real angle as shown by Barber's notes. I determined that I was at the place that Barber's notes indicated, from the angle from this point, by his angle and measurements. I considered that survey agreed exactly with Barber's survey. I found no discrepancy. I showed same from the scaling, that it was about 30 rods between the points A A on Exhibit G. I would say that the distance from east to west across what is indicated as island at figure 3, would be about 60 rods; from the extreme east point of the island to the east section line of 30 would be about 50 rods; from the west section line on section 30 to a point immediately west of the letter A on the timber point would be about 25 or 30 rods. I don't think there is 20 rods from A to A; plat, Exhibit G, was made in April, 1893. The water was quite high.

Q. At the time you asked Schlosser, after the survey was made, about paying his half, did he say then that he would pay any portion of the help for yourself and men?

A. He said he never agreed to pay anything for the survey; he did not say anything about help. I am sure about that. The written portion of Exhibit 41 is in my handwriting, and that is my signature.

The defendant offers in evidence as part of cross-examination, Exhibit 41.

Plaintiff objects as being incompetent, irrelevant, and immaterial; not cross-examination; the statement made by Mr. Grout would not be binding on Mr. Schlosser.

EXHIBIT 41.

W. L. Hemphill, Ruthven, Iowa:

Mr. Schlosser was here today. He says he never agreed to pay anything toward the survey, except to pay the man he furnished.

Yours respectfully, LEROY GROUT.

141 GEORGE SCHLOSSER, recalled.

I signed Exhibit 3. That portion, "For possession of land and fences," right over my signature, was not there when I signed it; it was not put there with my knowledge and consent; there was no talk between Hemphill and myself prior to signing the instrument, about possession of the land; it was not referred to in any way. Some time in April, Hemphill, his wife and his wife's sister, drove up one Sunday evening, called me out and wanted to buy the fence.

He claimed to me he had a patent on the land. There was nothing said about my giving possession of the land at that time. The fence was on the east line of section 30, between 29 and 30, and another that run from the half section, the northeast corner of the half section of 30, in a northwesterly direction. He came again to see about the fence, and claimed that he had bought the land; wanted to buy the fence, or wanted me to take it out of there. I thought it would be cheaper to sell it and buy new fencing, and put it on where it belonged, on the line.

Q. When the question of title was finally determined, do you mean?

A. Yes, sir.

I studied it over a little while, and I said, if you are a mind to give me $25 for the fence, you can do with it what you like. He said that he would take it, and paid me $5 there; promised to meet me in Ruthven and pay me the other $20. I met him at Furlong & Berg's store. He handed me the $20, then went back to the desk and wrote me out a receipt.

Q. Any discussion about giving up possession of the land, or importing possession?

A. No, sir; there was very little said about it.

I read over the receipt after he had written it. A controversy arose about the Crookshank fence. Crookshank had two wires
142 on there, and I had two. I had no right to sell the other two wires.

Mr. Alex Hemphill, W. L. Hemphill and Richard Ryan drove up one day, back of my barn; Hemphill and his father came over and got to talking fence; wanted to know whether I would put in my share of the fence. I told them whenever we got a final decision on the land, and everything was settled, I was willing to do my part in anything. I put in about 30 rods back of my barn, to get my cows over to my cow yard.

Cross-examination:

He claimed to me that he had bought the title from the county, and that he held a patent on it; Mr. Ryan claimed that he had a patent on his land. That is the way I understood it. I had contested Ryan's entry. I think I was mistaken about the patent; they claimed they had a patent later on; claimed it after they got the decision in Des Moines. Later on he claimed he had a patent. I knew Hemphill was intending to put a fence on the meander line. He spoke to me about it the time he and his father met me on the hill, and that Sunday when he and his wife came he said he wanted to put a fence on the meander line. He spoke about running from the east, right over to the meander corner west, back of my barn, which made about half the distance, and he wanted me to put in the balance. Nothing was said about who should have possession of the land. I have not seen the receipt since it was signed. I know

I would not have signed it if the words possession of the land had been there; I was not selling any possessions. I did not exactly know he was going to take possession. They just stepped right in and took it. I assumed that he was going to take possession.

Q. Now, what is there about that word possession, that you thought showed that it was written afterwards?

143 A. It shows that it was run more straight up and down, and curves over the letter G.

Q. Well, suppose he wrote that first? He would not run it over the letter G then.

A. I mean across the top of it.

Q. Well, suppose that G was not there, then he would not run it over that, would he? Do you see any other words where they run perpendicular in that way? How about that word, "southwest corner?" Does not it run up the same way?

A. All I have got to say is that the words "possession of lands and fences" was not there.

Q. You have seen Exhibit 3; do you remember whether there is any place in that, in the letters in your name, crossing over on the letters that were written by Hemphill?

A. That letter G runs up over the line; the word possession makes a curve up over it.

Q. It runs on the word possession too, does it not?

A. I think it runs close to it.

Q. After looking at the paper is there any other letters of your name that runs over the words that Mr. Hemphill wrote?

Plaintiff objects to the question as not the best evidence.

A. I do not think there is.

Q. Doesn't the letter S run right over the word land?

A. There is no mark of the pen there at all. I don't think it goes over Hemphill's letters.

Defendant offers in evidence, record of Palo Alto county, Book Number Four, Record of Deeds, page 473.

Plaintiff objects as irrelevant, immaterial and incompetent; the book is not produced in court, and that it is not rebuttal.

Book 4, page 473.

(Homestead receipt. See Exhibit D of Richard Ryan's answer.)

144 The defendant offers in evidence, Exhibit 43, being the original homestead receipt, number 1312, issued to Richard T. Ryan, for lots 12 and 13, section 30, township 97, range 34, signed by Stephen J. Loughran.

(See Exhibit D. Defendant Ryan's answer.)

Plaintiff objects as incompetent, irrelevant and immaterial; not rebuttal; the Government had passed title to this land when they issued title to Anthony; whole proceedings were without jurisdiction on the part of the department; wholly void as against the title of plaintiff.

By agreement the case is to be argued, submitted and decree to be rendered in vacation. Argument to be had at such time as the court and parties may agree.

On the 21st day of May, 1900, the following proceedings were had: Pursuant to application filed herein, defendant offers in evidence, Exhibit 44, being a certified copy of swamp land patent from the Government of the United States to the State of Iowa, for lots 11, 14 and 15, Barber's survey being a portion of the land in controversy.

Objected to by the plaintiff as incompetent, irrelevant and immaterial, and that the evidence shows that the land described in the patent was surveyed by the original Government surveyor, who subdivided the township in question, and patent duly issued therefore to parties, from and through whom the plaintiff claims title, and that upon said patent being issued, the Land Department of the Government lost the jurisdiction and power to interfere with the title which passed by virtue of said patent; that patent Exhibit 44 is void, illegal, unauthorized, and passes no title.

EXHIBIT 44.

United States of America, to the State of Iowa, conveying lots 12 and 13, of section 29, and lots 4, 7, 8, 9, 10, 11, 14 and
145 15 of section 30, township 97, range 34, containing in all, 298 acres and 29-100 of an acre, executed on the 18th day of April, 1900, by President William McKinley, F. M. McKean, sec'y, C. H. Brush, recorder of the General Land Office. Certified to as a true copy of the original on file in his office, by G. L. Dobson, secretary of state.

Defendant offers in evidence, Exhibit 45, being swamp land patent executed by the governor of the State of Iowa, to Palo Alto county. Plaintiff makes the same objection to Exhibit 45 that was made to Exhibit 44.

EXHIBIT 45.

Patent from the State of Iowa to Palo Alto county, conveying the same as Exhibit 44; executed on the 24th day of April, 1900. Signed, Leslie M. Shaw, governor; G. L. Dobson, secretary of state.

On the 10th day of August, 1900, the court rendered the following:

Decree.

And now, to-wit: on the 10th day of August, 1900, the court having considered the evidence and proofs offered, and being fully advised in the premises, it is ordered, adjudged, and decreed by the court that the issues are found for the plaintiff, and that plaintiff is entitled to the relief demanded in his petition; is the absolute and

unqualified owner in fee simple of lots 2 and 3, section 30, township 97, range 34, including all the land lying between the Government meander lines, and the high water mark of a certain body of water known as Mud lake, as well as the land lying between said meander line and the half section line of said section 30, except the land lying under the high water mark, and being covered by the waters of said lake. He is hereby entitled to immediate possession of said premises, and that a writ of removal issue to remove defendant from the possession of said land.

146 It is further decreed that the absolute title in fee simple in and to said premises be and the same is hereby established and quieted in the plaintiff, as an absolute indefeasible fee simple title, and the defendants are hereby estopped from having or claiming any right, title, interest or estate, in said premises, and they are perpetually enjoined from occupying or using said premises. Defendants except.

W. B. QUARTON, *Judge.*

Thereafter, and within the time provided by law, to-wit: on the 6th day of October, 1900, the defendants duly perfected their appeal from the judgment and decree, and other orders and rulings of the court and served upon the attorneys for the plaintiff, and upon the clerk of the district court of Palo Alto county notice of appeal in due form, and filed the same with the clerk of the district court of Palo Alto county, and secured to said clerk his fee for transcript of record, in manner provided by law.

Attorneys' Statement.

The foregoing is a full and complete abstract of the pleadings, record and evidence in the said case, and of the trial thereof in the district court, and contains all the evidence offered or introduced upon the trial, and the exceptions and objections taken, and all the orders and proceedings of said case, and the decree and judgment of the court.

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for the Plaintiff.

Notice.

The defendants will ask to be heard in oral argument in the supreme court.

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for the Plaintiff.

147 *Cost of Printing.*

I hereby certify the cost of printing the foregoing abstract was $139.75.

E. B. EVANS.

148 In the Supreme Court of Iowa, January Term, A. D. 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick and Carr & Parker, for plaintiff and appellee.

E. B. Evans and Morling & Davidson, for defendants and appellants.

Appellants' Additional Abstract of Record.

The appellants file the following amendment to and additional abstract setting forth some matters that were omitted in the former abstract:

On the 11th day of April, 1900, defendants filed the following

Amendment to Their Answer.

149 Further answering, these defendants say that under and by virtue of the laws of Congress of the United States, these defendants are the owners of the land in controversy herein, and that they claim the ownership and the right to possession by virtue of the acts of Congress, and that prior to the several acts of the Land Department of the United States, in the answer of the defendants herein referred to, the said lands were the public lands of the United States, and the State of Iowa had no jurisdiction thereof, and its courts and laws had no jurisdiction or authority thereover, and that only the courts and the Land Department of the United States *has* jurisdiction of this controversy.

(For reply see pages 12, 13 and 14, appellants' abstract.)

Plaintiff offers in evidence Exhibits H to O, inclusive.

Objected — as not having been properly identified, and irrelevant and immaterial.

150

EXHIBIT I.

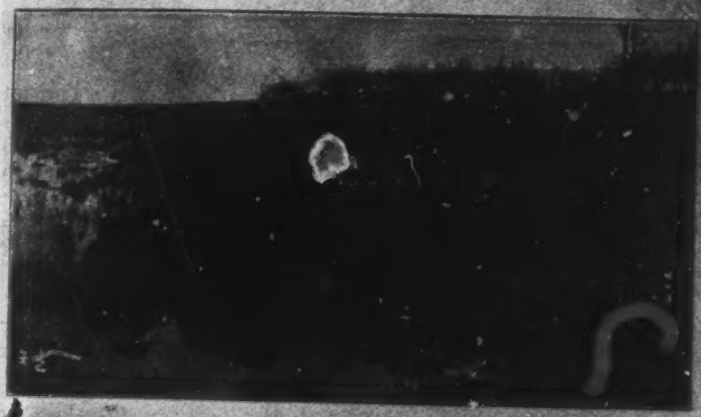
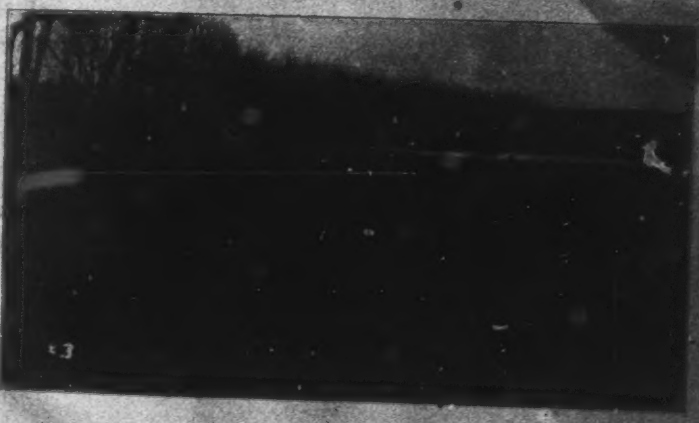
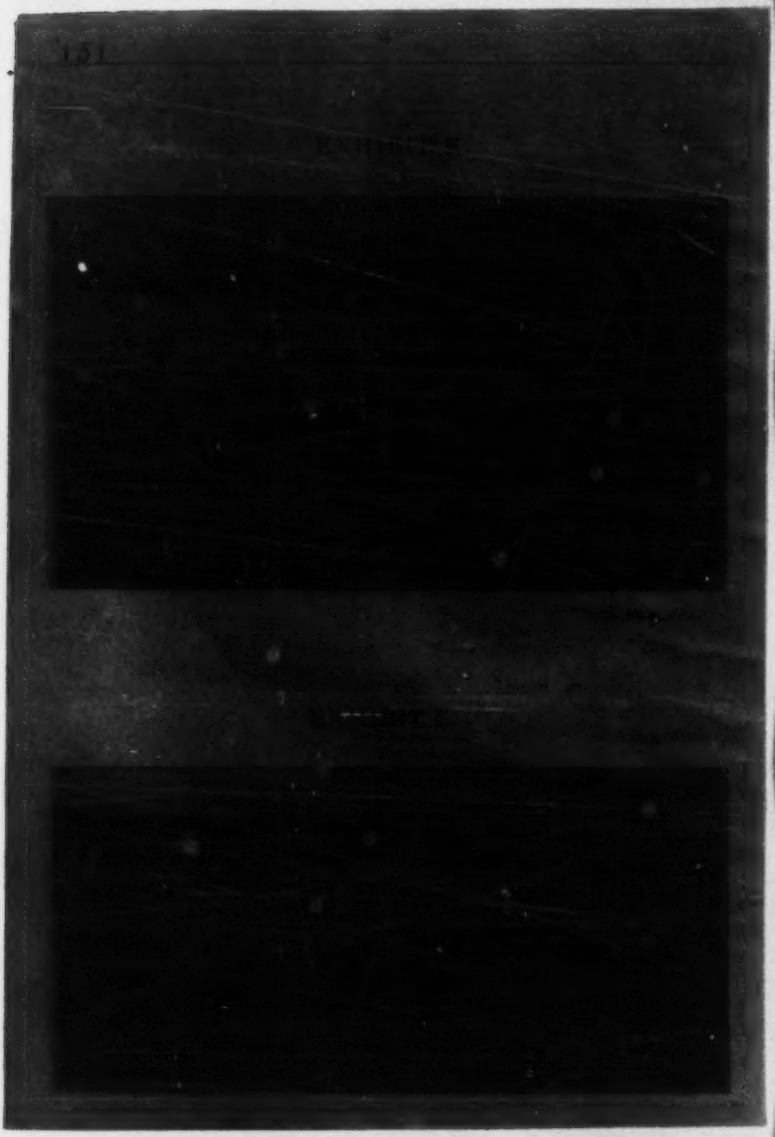
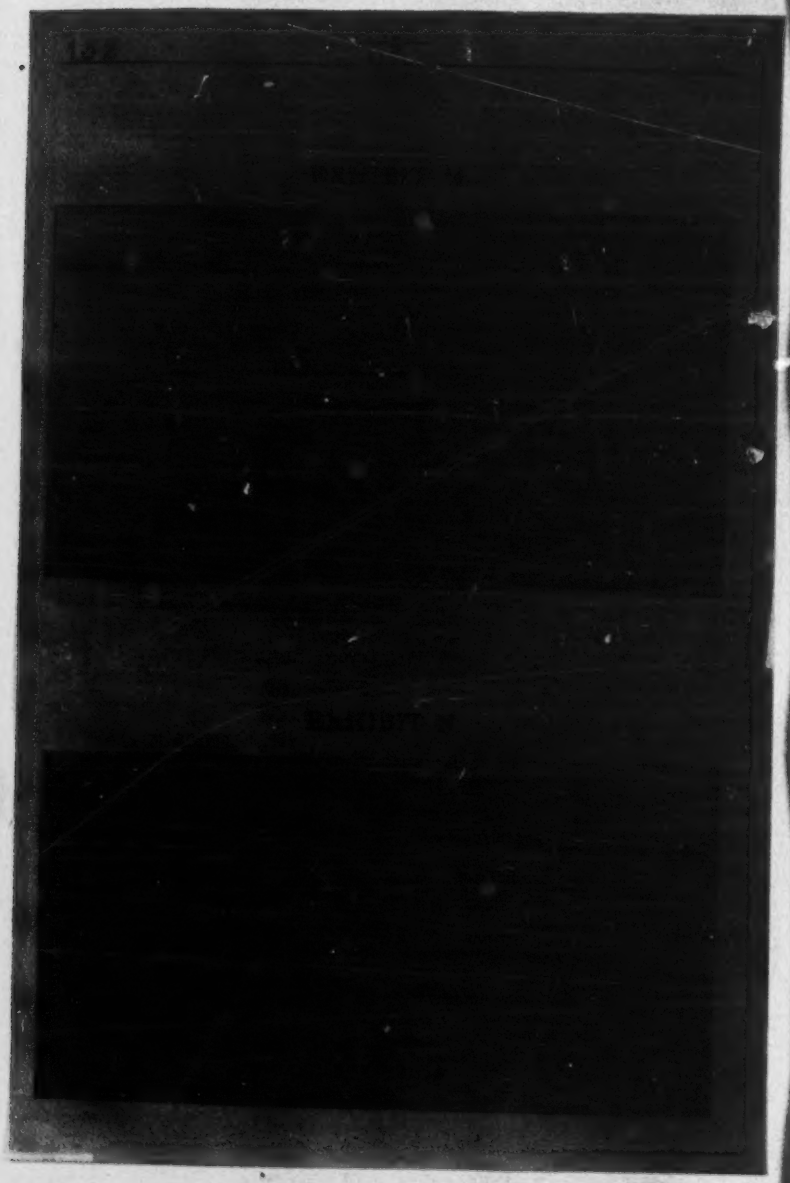


EXHIBIT J.

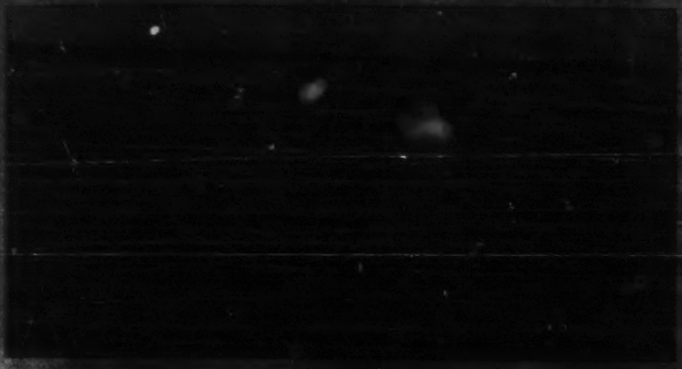






153

EXHIBIT O.



(See appellant's abstract, pages 30, 31 and 32.)

Defendants offer in evidence Exhibits Nos. 1 and 5 to 20, inclusive, together with letters A to P, inclusive, placed upon the margin of said photograph Exhibits, with the corresponding letters on the plat Exhibit No. 4.

Objected to as incompetent, irrelevant and immaterial.

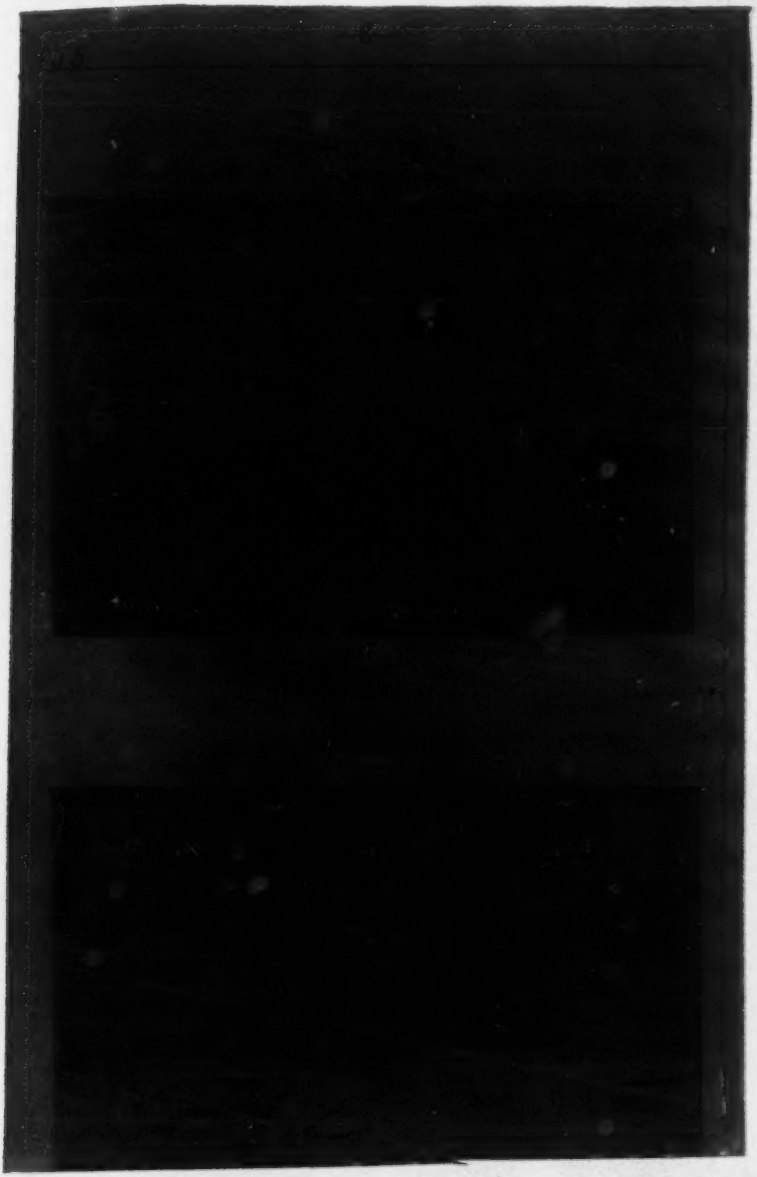
(See appellant's abstract, pages 58 to 61, inclusive).

EXHIBIT No. 1.

154

EXHIBIT No. 5

EXHIBIT No. 6



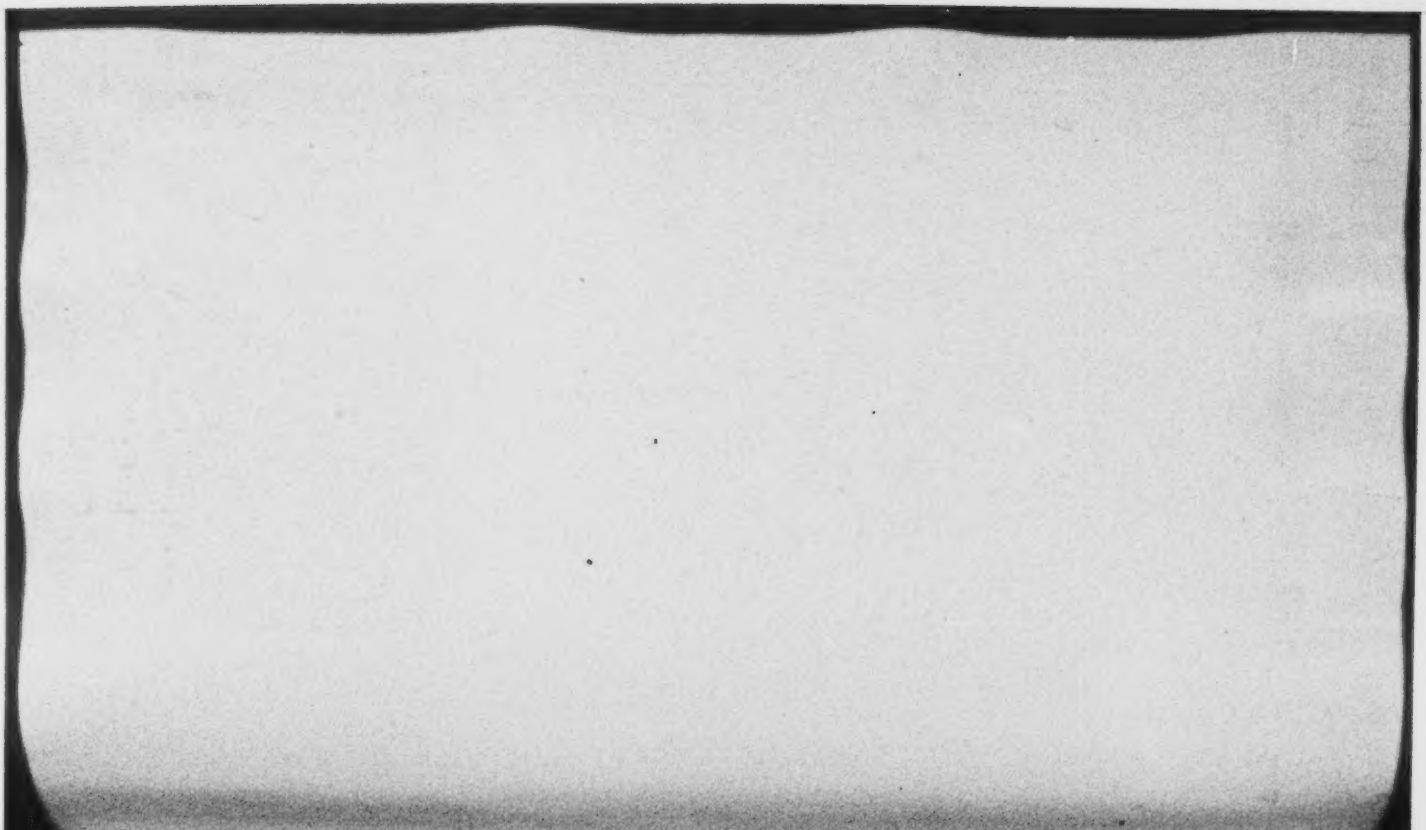
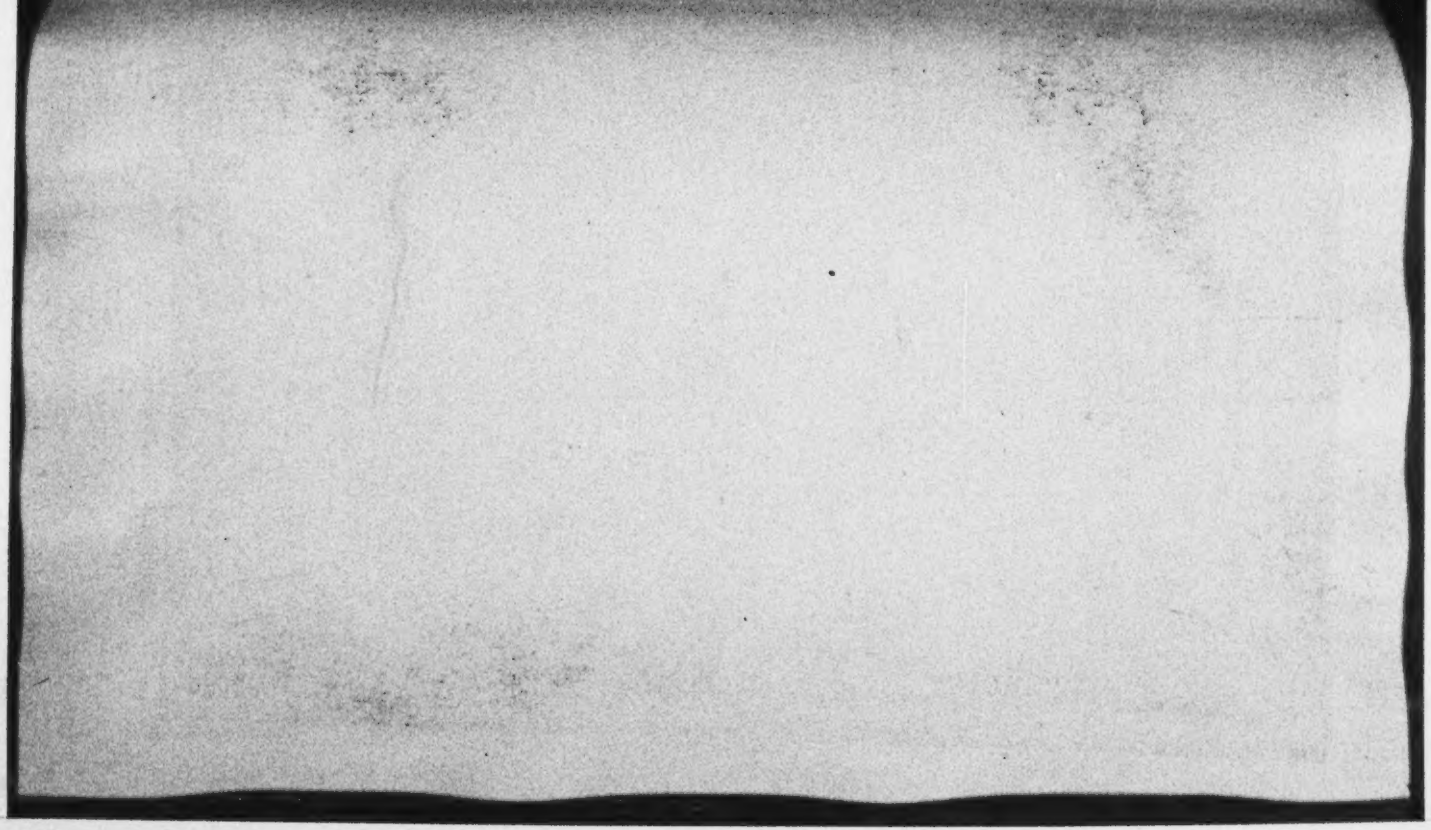
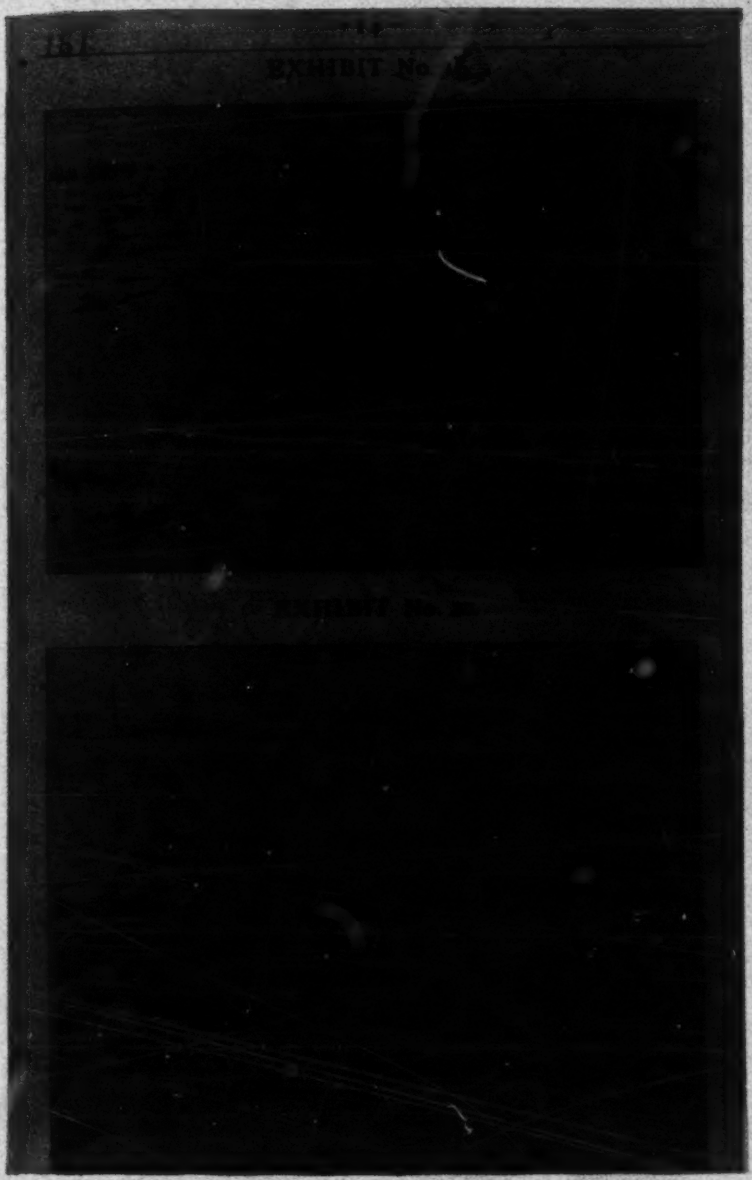


EXHIBIT No. 17

EXHIBIT No. 18





162 *Attorneys' Statement.*

The foregoing amended abstract, together with appellants' abstract, heretofore filed, is a full and complete abstract of the pleadings, record and evidence in the said case, and of the trial thereof in the district court, and contains all the evidence offered or introduced upon the trial, and the exceptions and objections taken, and all the orders and proceedings in said case, and the decree and judgment of the court.

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for Appellants and Defendants.

The signature to attorneys' statement, and to notice of oral argument in appellants' abstract should be, and is hereby corrected to read: "E. B. Evans and Morling & Davidson, attorneys for appellants and defendants."

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for Appellants and Defendants.

163 In the Supreme Court of Iowa, January Term, 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick, and Carr & Parker, for plaintiff and appellee.

E. B. Evans and Morling & Davidson, for defendants and appellants.

Appellee's Abstract of Record.

The appellee, deeming the abstract of appellants incomplete and incorrect, deny- the correctness thereof and set- out the following record in addition thereto and in correction thereof.

In the abstract of the reply to the answer of Richard Ryan, the word "denies" being the second word in the second line of page 10, should be changed to the word "admits" so that the same will read, "Plaintiff admits that defendant went into possession of a portion of the land, etc."

164 The word "denies" in the fourth line on page 10 should be changed to "admits."

After the word "entry" in the twelvth line on page 10 the following clause should be added: "than to hold the title to the land against divers squatters who were taking possession and claiming title to same as Government land."

After the word "herein" in the last line of said abstract of reply, on page 10, the following paragraph should be added: "This reply is made to stand to the amendment of Richard Ryan this day filed, and plaintiff makes the same reply to said amendment as this day made to amendment of W. L. Hemphill."

After the word "county" in the eleventh line of the reply to W. L. Hemphill *et al.* on page 13 the following should be inserted: "But plaintiff avers that he made said application under advice of counsel that it would not effect his legal rights to the title obtained by virtue of the patent of Anthony, and that it would be cheaper to make entry thereof under the claimed re-survey than it would be to fight the several squatters who were at different times settling on the land and claiming it to be Government land, and he at no time abandoned or relinquished his title obtained through said patent."

Neither Exhibits "B," "C" or "D" describe or name the number of acres conveyed as shown in Exhibit "A," on page 15 of abstract, and said exhibits make no reference to the number of acres.

After the statement as to a sand bank by the witness Schlosser in first and second lines of page 19, is the following question and answer: "Q." "Could you tell from observing the sand bank whether it had been thrown up there by the action of the water, or was there a natural division between them."

"The defendant objects to the question asked as calling for the conclusion of the witness, and the witness not showing himself competent to express an opinion. "A." "I should say that it was done by the action of the water."

The word "northwest" in the direct examination of the witness M. S. Green in the 16th line on page 21 should be "southwest."

The word "water" in the first line on page 22 was evidently intended as "beach" and is apparently a mistake of the wit-
165 ness Green or reporter. The questions and answers in connection therewith are as follows:

Q. "But as indicated there, as the water was in former times, about how wide would the beach be?"

A. "I think there was a time when there was no water there."

"The defendants move to strike out the answer of the witness as being a conclusion of the witness and not based upon any actual knowledge."

Q. "Is there a highway there at that point you call a beach?"

A. "Yes sir."

In the next to the last paragraph on page 24 in the direct examination of James Spaulding, after the word "through" in the sixth line, the following should be inserted:

Q. "Do you remember Mr. Anthony's occupying this place?"

A. "Yes sir." He claimed to own the island over across here."

"Defendants moves to strike out the answer of the witness as being incompetent and immaterial."

"I was told that he sold timber from there."

Q. "What about Mr. Ant-ony, did he occupy and have possession of this point at the west of this half section."

A. "He claimed it, yes sir."

"The defendants objects to the question asked as irrelevant and immaterial."

"The timber on the point was smaller. On the island there was walnut, ash and oak, and I think ash and oak on the point."

Pursuant to offer of plaintiff of the Government field notes at bottom of page 24 of abstract, the plaintiff offers the following meander notes, taken from page 317 of the record:

Commencing at meander post on west boundary in township 97 north, range 34 west, running east.

13 In section 30.
N. 70 E. 11.00 var. east.
S. 80 E. 14.00.
S. 40 E. 15.00.
N. 70½ E. 8.00.
N. 22½ E. 12.00.
166 S. 82 E. 15.00.
S. 20 E. 18.50 intersected line between section 30 and 31 at
14 post.

In the fourth line of page 28 in the cross examination of James Spaulding the word "southwest" should be changed to "south and west" to conform to the evidence.

In the seventh and eight- lines of the cross examination of James Spaulding on page 28, the abstract incorrectly recites: "The part of the plat marked lake southwest of the island was used as pasture in 1871." The evidence is as follows:

Q. "And, the land on the south half of section 30 was used for pasture at that time, was it not, Mr. Spaulding?"

A. "On the west end, not on the east."

Q. "Well, that was this land up in here that is marked lake, was it not?"

A. "South of the point."

Q. "South of the point."

A. "Yes sir, and this answered for fence here."

Q. "That is all between the island and the point, so called?"

A. "Yes sir."

Q. "So that this part that is marked lake on this plat, southwest of the island, so called, was then used as pasture, when you came to this country in 1871?"

A. "I think so."

Examination by Mr. A. C. PARKER:

Q. "I understood you to say that this part here answered as a fence?"

A. "I did."

Examination by Mr. E. A. MORLING:

Q. "He said that this in here answered as a fence?"
A. "No sir, that."
Q. "Can you just make a sort of mark there where you say the fence was, where you think the fence was?"
A. "There was no fence on that side; the fence was on the south and run over to the lake, over to Mud lake, and down to this, was all the fence I knew of?
Q. "So you could not be positive whether this land where you have made the cross, southwest of the island here was not used
167 as pasture and actually pastured in 1871, could you?"
A. "I don't remember whether there was any fence east of that or not, but I know that this water answered as a fence."
Q. "But, you could not be sure whether that water that answered as a fence was up on the north part of the section, or on the south part?"
A. "It run up here next to Schlosser's house."

At the end of the re-direct examination of James Spaulding on page 29 is the following sentence. "The outlet of the spring is in the lake." This, to conform to the evidence, should be "The outlet of the springs is the lake."

The word land in the thirteenth line on page 30 in the direct examination of Francis Fitzgerald should be changed to "island" so as to read "between the island and Schlosser's land."

After the first question and answer of the cross-examination of Fitzgerald on page 31 was the following evidence:

Q. "Which year was it you was there?"
A. "I think I came there in 1871."
Q. "Do you remember whether that year was a dry year?"
A. "I think it was a kind of average year."
Q. "Do you remember whether any part of this marsh was dry so it could be traveled over that year.
A. "I think not."
Q. "Do you remember years during the early part of the time that you were there when you could travel over on dry land from the high land, over across what is marked as wet land, over to the island?"
A. "I think it could not be traveled any of those years in the summer time" "Except the year I have reference to, about seven years ago."

I don't remember before 1891 that there were years when that was partially dried up.

In the said cross-examination at about the middle of page 31 the following evidence should be included in the abstract:

Q. "That is true of a greater part of what is known as Mud lake, it goes gradually into a marsh, instead of having any well defined bank?"

A. "Well no, there is a good big part of it has a well defined
168 bank, probably two-thirds of it, maybe not that much: I can't tell, I never measured it."

In the eighth line of page 32 of the cross-examination of Fitzgerald is the sentence "The entire bed of Mud lake was dry up to seven or eight years ago."

The same should be corrected to conform to the evidence to read as follows: I think the entire bed of Mud lake was dry seven or eight years ago.

At the top of page 34 of the direct examination of Nicholas Rice the following evidence should be included in the abstract.

Q. "Have you observed the lay of the land immediately south and north of the southeast corner of section 30?"

A. "Yes sir."

There is a divide between the swamp land or lake, Mud lake, at that point and Lost Island lake, about 10 or 12 rods wide. The character of the divide is sand and no sod. To the north of the bar is a boggy marsh which is continuous up to the sand bar, and to the south is Lost Island lake which comes right up to the sand. The length of the bar is about 80 rods and during the whole length of it Lost Island lake comes along here, and the marsh extends during the full extent of the 80 rods on the north.

In the third line of page 37 of abstract of the re-direct examination of the witness Rice the word "this" should be changed to "these" so that the sentence reads: The water from these springs run- into the lake.

After the sentence, "I got wood off the island in 1870," in the direct examination of Mr. Crookshank, at about the middle of page 38, the following evidence should be included.

"I bought five trees on the island." * * * "Mr. Anthony had sold them."

At commencement of re-direct examination of John T. Crookshank on page 45 the following evidence should be included:

I would say that the sand ridge has widened about two rods. In my judgment the ice shoved up to the bank like, shoving up a lot of sand, and the wind, has caused it to widen.

After the cross examination of Mr. Hanson on page 46 the following evidence was brought out on re-direct examination:

169 Q. "Do you know of any inlet coming into Mud lake from the northeast."

A. "Yes sir."

Q. Do you know what extent of country it drains in there?"

A. "It drains into what they call Twelve Mile lake, I think 7 or 8 miles to the northeast."

I have been there but I could not tell how large a body of water Twelve Mile lake is. I could not say that it is the outlet of that lake that runs into the inlet to Mud lake. I know it did drain from up that way

At the close of the cross-examination of Mr. Oliver on page 48

after the word "shallow" in the second line is the following evidence:

Q. "It was very shallow you think?"

A. "At that particular part I consider it shallow, because I could see grass growing up that fall."

The following evidence of the witness Schlosser has been omitted by appellant at page 49.

Q. "Now, is this portion that is marked lake or swamp land, does that extend down to the lake shore of Lost Island lake. If not, how near does it approach it at the nearest point?"

A. "It comes within about ten rods."

About half way from my house, along here, there is a strip of trees, and the balance of of the way down clean past the section corner is nothing but sand with no sod only on the side next to the marsh on the north and no trees down there about the narrow point.

The last two lines of the direct examination of Mr. Schlosser as shown by abstract on page 49 are incorrect.

The word "raised" in the next to the last line should be changed to "runs" and the word "to" in the last line should be changed to "by" and the following words of the answer of Mr. Schlosser should be added: "It runs on the south half in here." The same being in answer to the following question: "The lake proper, does it come on the south half of the section, or is it on the north half?"

The word "flax," being the last word in the second line on page 50 should be changed to "fields." And the following is a part of the examination with reference thereto:

Q. "Aside from the pond holes marked five and six, your
170 cattle pastured all over the south half of the section in 1892, did they?"

A. "Yes sir, mostly all over it."

Q. Mostly, did they all over it?"

A. Yes sir, I think they did." Mostly in the latter part of the fall."

Q. "Did they in the early part of the season?"

A. "No there was more or less water along in the spring, and then it receded back."

The sentence "I have pastured it every year" in the tenth line on page 50 should be qualified. The evidence is as follows:

Q. "You have pastured it every year, have you?

A. "Yes sir."

Q. "Every year you have been there except the first?"

A. "Yes sir, when ever the stock would go on it."

The sentence in the fourth and fifth lines of cross examination of Mr. Schlosser on page 51, as follows: "I am claiming the whole half section on the strength of having 99.80 acres" is incorrect, and the witness did not so testify. It appears to be the testimony of the examiner.

The word "SWAMP" as written in Exhibit 4 as shown on page

58 is not shown on the exhibit in evidence of which this is intended to be a copy.

After the word "plat" in the eighth line of page 60 is the following evidence of the witness Wilcox.

"I was turned around there; I didn't have the directions right."

After the evidence as to No. 15 on page 61 is the following testimony of the witness P. M. Moore: No. 16, I don't know. No. 17 may be the house upon the island. No. 18, I don't know. No. 19, I only know that there was scenery that would make such a picture as that, but I would not say that I saw it taken. No. 20, don't know.

The answer to the question propounded to the witness J. T. Painter, near the middle of page 83, "You do not understand from that survey that there was not a lake there when they were surveying that, do you?" was not "Yes sir." * * * as stated in the abstract. The answer was "It says there was a lake there"

After the figures "$20," in the ninth line on page 101 of
171 the direct examination of Alex Hemphill is the following evidence omitted from abstract:

Q. "What did Mr. Schlosser ask for the fence?"

A. "Why, their talk was there, he paid him $20, and he had paid him $5 before in the pasture, or something, that is the way they talked, and that made $25. He handed him the $20 and said this was for the balance."

He said this was for the balance on the fence, and they went back then, after the $20 was handed him for the fence, they went to the back part of the room to write out a receipt.

At the last part of the cross-examination of Mr. Davis on page 1 6 of abstract is the following evidence omitted:

Q. "Where does Mud lake empty into, what lake?"

A. "Into Swan lake, somewheres there—I will be blamed if I know."

The outlet is on the south side if I remember right. I get turned around up in that country amongst those lakes and islands, anyway. I quit freighting around that lake after they got the railroad into Spencer in 1878. I have not been on the south side of the lake since 1878 until the other day; there has been a great change since I came through in the country there.

The objection to Defendants' Exhibit "2" is not correctly shown on the bottom of page 109. The abstract should also state that said exhibit is objected to as incompetent and secondary evidence, and not properly certified; also the words "only a point" in the fifth line thereof should be changed to "incompetent," and the word "wade" in the fourth line from the bottom should be "made" in order to conform to the transcript.

The figures "29" in the objection on page 116, near the bottom of the page, should be changed to "30," so that the same will read Plaintiff objects to Exhibits Nos. "22" to "30," inclusive, etc.

After this objection and before the words "Exhibit 32" on page 117, the following agreement should be noted:

"It is agreed that the plaintiff may object after the record of the offer as to Exhibits "32" and to "34" is made."

172 After the word "evidence" in the top line of page 119 the following word and figures should be introduced: "Exhibit 34," so that said line will read, "Defendants offer in evidence Exhibit 34," etc.

Also the objection following said offer of Exhibit "34" is incorrectly set out and should recite as follows:

The plaintiff objects to each of said Exhibits "32" to "34" inclusive: and makes the objection to each separately, the same as to Exhibit No. "2" and to each of the Exhibits "22" to "30," inclusive.

After the words "pay me the other $20," in the direct examination of the witness Schlosser in the eighth line from the bottom on page 141 is the following evidence omitted from abstract: "Q." "At that time when we paid you the $5, was there anything said about writing up a contract, or a receipt, or anything?"

"A." "I don't remember of anything being said there at all."

Q. "Anything said about possession of the land?"

A. "No sir."

After the word "patent" in the seventh line of the cross examination of Mr. Schlosser on page 142, the following evidence should be inserted:

Q. "Is any of this fence that you sold to Hemphill on the south half of section 30?"

A. "No sir."

A part of the fence was on section 29 according to Barber's lines, and run north to the half section line, and then over on the north half it run in a northwesterly direction until it struck the inlet, then it turned in a southwesterly direction and run down the channel of the lake out into the lake.

Before the question at the bottom of page 142 there was the following evidence omitted from the abstract:

"Q." "When that receipt was shown to you, wasn't your attention called to the fact that the word possession in the last line of the receipt runs up over the 'G'?"

A. "No sir."

I noticed it myself, and I also noticed these letters here, they didn't run in the same angle with these others, those run more straighter up and down than the others does. When I read the

173 receipt and come down to the words "For possession of land and fences," I know that was not in there when I signed that paper. I would not have signed it if it had been there, and I would not be apt to sell about 800 pounds of wire for $25 and throw my possession in.

We, Buck & Kirkpatrick and Carr & Parker hereby certify that the foregoing is a true and correct abstract of the record and evidence offered on trial of said cause so far as the same purports to set out the record, and the same is correctly set out therein.

BUCK & KIRKPATRICK AND
CARR & PARKER,
Attorneys for Appellee.

Cost of Printing.

We hereby certify the cost of printing the foregoing abstract was $12.

BUCK & KIRKPATRICK.

174 In the Supreme Court of Iowa, January Term, 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick, and Carr & Parker, for plaintiff and appellee.
E. B. Evans and Morling & Davidson, for defendants and appellants.

Appellee's Amendment to Abstract of Record.

The appellee deeming the abstracts of appellan-t and appellee, heretofore filed, incomplete and insufficient for a full understanding of the questions presented to the court for decision, sets out the following abstract of record in addition thereto and by way of amendment thereof.

A true and correct copy of Exhibit A referred to in appellants' abstract on page 15, is in words and figures as follows towit:

175 U. S. to John A. Anthony. Filed April 13, 1875, at 8 a. m.

Homestead Certificate No. 1136, *Application* 1686.

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux City, Iowa, whereby it appears that pursuant to the act of Congress approved 20th May 1862, "to secure homesteads to actual

settlers on the public domain," and the acts supplemental thereto, the claim of John A. Anthony has been established and duly consummated in conformity to law for the

Lots numbered two and three of section thirty, in township ninety-seven of range thirty-four in the district of lands subject to sale at Sioux City, Iowa, containing ninety-nine acres and eighty hundredths of an acre (excess paid as per receiver's receipt No. 2213) according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general.

Now know ye, that there is therefore granted by the United States unto the said John A. Anthony the tract of land above described.

To have and to hold the said tract of land with the appurtenances thereof, unto the said John A. Anthony and to his heirs and assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the tenth day of October in the year of our Lord one thousand eight hundred and seventy-four and of the Independence of the United States the ninety-ninth.

By the President,

[United States General Land Office.]

U. S. GRANT,
By S. D. WILLIAMSON, *Secretary.*

Recorded vol. 3, page 111.

L. K. LIPPINCOTT,
Recorder of the General Land Office.

STATE OF IOWA, } ss:
Palo Alto County, }

I, Lewis Stuehmer, recorder of said county, do hereby certify
176 that the foregoing is a full, true and correct copy of a patent as it appears in Deed Record "H" on page 89, in my office. Witness my hand, this 25th day of April A. D. 1893.

LEWIS STUEHMER,
Recorder of Palo Alto County, Iowa.

Pursuant to offer of the Government field notes as noted at the bottom of page 24 of appellants' abstract, the appellee calls attention to the following notes of survey on township line between section 25–97–35 in Clay county and section 30–97–34 in Palo Alto county and as affecting the west line of said section 30, same appearing on page 368 of field notes record, and said survey bearing date of July 27, 1855.

"North between sections 25 and 30, var. 11° 45′ E.
16.43 Set meander post on south side of lake.
Lake bears N. E. and S. W., made mound of earth and sod pit 8 links south.
59.31 Set meander post on north side of lake.
Made mound of earth and sod pit 8 links N. of post.
80.00 Set post corner to section 19, 24, 25 and 30.
Made mound of earth and sod pit 8 links south of post. Corner in swamp.
Swamp from corner bears E. and W.
Prairie level soil 1st rate, growth grass and weeds."

Plaintiff also calls attention to the following notes of survey of subdivision of township 97 range 34 west of 5th P. M. commenced July 25th 1857, completed July 31, 1857, as found on page 312 of the record of field notes.

"West random between sections 30 and 31 var. E. 10° 53′.
74.92 Length of line between sections 30 and 31.
East corrected between sections 30 and 31 var. E. 10° 44′.
37.40 Scattering timber bears N. and S.
34.92 Set a quarter section post.
Bearings: Bur O. 10 S. 63 W. 36
Do. 10 N. 53 W. 46
45.00 Leave timber bears N. and S.
64.42 Lake marsh. Set a meander post in mound of turf, pit E. 8 links.
74.92 Section corner.
Surface level, soil 3d rate timber oak.

The record of field notes from which the foregoing selections are taken appears to be duly certified by the register of the land
177 office as a true and correct copy of the original field notes of the Government survey, which certificate bears date of April 21, 1873, and said record filed in the office of the auditor of Palo Alto county, Iowa, Jan. 6, 1874.

We, Buck & Kirkpatrick and Carr & Parker hereby certify that the foregoing is a true and correct abstract of the record and evidence offered on trial of said cause so for as the same purports to set out the record, and the same is correctly set out therein.

BUCK & KIRKPATRICK AND
CARR & PARKER,
Attorneys for Appellee.

Cost of Printing.

We hereby certify the cost of printing the foregoing abstract was $4.

BUCK & KIRKPATRICK.

178 *Appeal Bond to Supreme Court.*

In the Sup. Court of Iowa.

GEORGE SCHLOSSER
vs.
W. L. HEMPHILL, RICHARD RYAN & PALO ALTO CO., IOWA. } —— Term, 189-.

Know all men by these presents, that we George Schlosser as principal, and G. W. McDonald and Joseph Hanson as surety-, are held and firmly bound unto W. L. Hemphill, Richard Ryan & Palo Alto Co., Iowa, in the penal sum of one thousand ($1,000) dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors and assigns, firmly by these presents.

Dated this 9th day of December A. D. 1903.

The condition of this bond is such, that whereas the said George Schlosser has sued out a writ of error from the supreme court of the State of Iowa, to the Sup. Court of the United States from the judgment or order of the supreme court of the State of Iowa, made at the May term of said court June 3, A. D. 1902 in a certain cause in said court wher-in George Schlosser is plaintiff, and W. L. Hemphill Richard Ryan & Palo Alto Co. Iowa *is* defendant-.

Now, if the said George Schlosser shall pay all costs and damages that shall be adjudged against him and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered, by the Supreme Court of the U. S., not exceeding in amount or value the original judgment or order, and all rents or hire, or damages to the property during the pendancy of the appeal and prosecute his said writ of error with effect, and if it shall fail to make its plea good he shall answer all damages & costs, then this obligation to be void, otherwise to be and remain in full force.

GEO. SCHLOSSER, *Principal.*
G. W. McDONALD, *Surety.*
JOSEPH HANSON, *Surety.*

—— ——,
District Court.

179 [Endorsed:] No.—. Appeal bond. —— —— *vs.* —— ——.
The within and foregoing bond filed, accepted and approved by me this 11th day of December 1903 Charles A. Bishop, chief justice supreme court of Iowa. Filed Dec. 11 1903 Jno. C. Crockett clerk supreme court. Dec. 11th 1903 Approved this 11th day of Dec. 1903 Jno. C. Crockett clerk supreme court.

STATE OF IOWA, }
Palo Alto County, } ss:

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand & no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand & no dollars.

G. W. McDONALD.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand & no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand & no dollars.

JOSEPH HANSON.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of — dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

—— ——.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of — dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

—— ——.

Sworn to before me, and subscribed in my presence by the said G. W. McDonald and Joseph Hanson this 8th day of Dec. A. D. 1903.

[Notarial Seal of J. H. Thatcher, Palo Alto County, Iowa.]

J. H. THATCHER,
Notary Public.

STATE OF IOWA, }
Palo Alto County, } ss:

I, D. A. Johnson, clerk of the district court within and for said county and State, do hereby certify that I know the sureties within named and am acquainted with their financial ability, and that if the within bond were presented to me for approval I would have no hesitancy in approving the same.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Emmetsburg on this 9 day of December, 1903.

[Seal of the District Court of Palo Alto County, Iowa.]

D. A. JOHNSON,
Clerk of the District Court of Palo Alto County, Iowa.

180 STATE OF IOWA, } ss:
Palo Alto County, }

I, do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand and no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand and no dollars.

G. W. McDONALD.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand & no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand & no dollars.

JOSEPH HANSON.

Sworn to before me, and subscribed in my presence by the said G. W. McDonald and Joseph Hanson this 8th day of December A. D. 1903.

J. H. THATCHER,
Notary Public.

STATE OF IOWA, } ss:
Palo Alto County, }

I, D. A. Johnson, clerk of the district court within and for said county and State, do hereby certify that I know the sureties within named and am acquainted with their financial ability, and that if the within bond were presented to me for approval I would have no hesitancy in approving the same.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Emmetsburg on this 9th day of December, 1903.

D. A. JOHNSON,
Clerk District Court of Palo Alto County, Iowa.

The within and foregoing bond filed, accepted and approved by me this 11th day of December 1903.

CHAS. A. BISHOP,
Chief Justice Supreme Court of Iowa.

Approved this 11th day of Dec. 1903.
Filed " " " " "

JNO. C. CROCKETT,
Clerk Supreme Court.

181 In the Supreme Court of Iowa.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO COUNTY, IOWA, Defendants in Error.

Geo. E. Clarke, attorney for plaintiff in error.
E. B. Evans and A. E. Morling, attorneys for defendants in error.

To W. L. Hemphill, Richard Ryan, and Palo Alto County, Iowa, and E. B. Evans and A. E. Morling, their attorneys:

Whereas George Schlosser has lately sued out a writ of error to the Supreme Court of the United States from a judgment and decision lately rendered in the supreme court of Iowa in favor of W. L. Hemphill, Richard Ryan and Palo Alto County, Iowa, and the said George Schlosser has filed the security required by law and perfected his said writ of error, you are therefor- hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the second Monday of October next, 1904, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Des Moines, Iowa, on the 12th day of December, A. D. 1903.

CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

DES MOINES, IOWA, *December* 12, 1903.

Due and legal service accepted of the foregoing order and citation.

E. B. EVANS,
Attorney for Defendants in Error, &
MORELING & DAVIDSON.

182 In the Supreme Court of Iowa.

Filed June 3rd, 1902.

GEORGE SCHLOSSER
vs.
W. L. HEMPHILL, RICHARD RYAN, ET AL., Appellants.

Appeal from Palo Alto district court—W. B. Quarton, judge.

This is an action in equity to quiet title to a tract of some two hundred and ninety acres of land in the south half of section 30, township 97 range 34 in Palo Alto county. Plaintiff is the admitted owner of lots 2 and 3 forming a part of said tract and containing about ninety nine acres. According to the original Government sur-

vey made in 1857, this land was adjacent to a lake which was meandered, and the meander lines were run along the north side of the said two lots. The remainder of the land claimed lies between this meander line and the alleged shore of the lake, and is the subject of the controversy.

The half section in question, that is such part of it as lies beyond the original meander line, was re-surveyed by the Government in the year 1898 and platted into five lots, of which lots 11, 14 and 16 are claimed by defendant Hemphill and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto county, under a patent issued to the State, under the swamp land grant of 1850 and which is based upon the re-survey of 1898. Schlosser insists that the meander line is not his boundary, it not marking the edge of the lake, but that he is entitled to claim up to the east and west half section line of said section.

183 There was a decree for plaintiff and defendants appeal.

E. B. Evans and Morling & Davidson, for appellants.
Buck & Kirkpatrick and Carr & Parker, for appellee.

WATERMAN, *J.*:

Lots 2 and 3 which plaintiff admittedly owns, are bounded on the south by the south section line and they extend almost across said section from east to west. Plaintiff's claim was once before presented to this court in an action of a similar nature to this, but against a different defendant. See Schlosser *vs.* Cruickshank, 96 Iowa 414. Plaintiff was then successful. But that was before the re-survey and issuance of a patent and the making of conveyance by the county. And more than this, in the other case Schlosser claimed title only to the actual margin of the alleged lake, while here he claims to the half section line, which was first run through this section by the resurvey of 1898.

It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence then before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake.

When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser *vs.* Cruickshank, *supra* and authorities therein cited.

In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent resurvey by the Government in the absence of fraud

or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto.

184 Mitchell & Smale, 140 U. S., 819.

But where there is no adjacent body of water proper to be meandered the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the Government according thereto cannot claim title beyond it. Grant *vs.* Hemphill 92 Iowa 218; French-Glen L. S. Co. *vs.* Springer 22 S. C. Rep. 563.

We have then to determine whether there was a body of water in section 30, proper to be meandered. As to what bodies of water should be meandered see Lester's Land Laws (ed. 1860) 714. We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the conclusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there. The lake spoken of in Schlosser *vs.* Cruickshank, as being about two miles wide, three miles long and 10 to 18 feet deep and adjacent to this land is evidently Lost Island lake, which lies south of section 30 and nowhere touches it. The meandered lake which gives rise to this controversy is called Mud lake and as must be manifest from what we have said, lies north of plaintiff's land. How far, if at all, this mistake affected the conclusion in the Cruickshank case, we are not able to say, but that it was an error is clear from the fact that neither witnesses or counsel for plaintiff claim Mud lake to answer at all to the description so given. The confusion seems to have arisen from the fact that the Cruickshank case was submitted in connection with another case involving similar questions.—Caldwell *vs.* Jackson,—but which related to land bordering upon Lost Island lake, and the arguments were made in the latter case.

The case of Grant & Hemphill to which we have alluded above involved Mud lake, as alleged on section 19, which of course adjoins section 30, on the north and the evidence in that case, in

185 which it was found no lake existed adjacent to the land of the plaintiff in that action, seems to have been quite similar to what is relied on here in suppost of Schlosser's case. We are confirmed in our conclusion by plaintiff's present claim. He does not seek to extend his north line to the shore of a lake but to the half section line, which did not appear on the original plat, for with the exception of a very small tract in the northwest corner of the section, the lake was shown to cover that whole sub-division outside of plaintiff's two lots. The half section line certainly does not mark the shore line of any body of water at present or heretofore existing. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north

of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conlusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was, is far south of the half section line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

Rood & Wallace, 109 Iowa, 51.
Noyes *vs.* Board of Supervisors etc. 104 *id.* 174.

The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the greater part of such body of water was but temporary in character, is sufficient to convince us that no meander line should ever have been run here. Plaintiff's present claim and the facts and arguments in its support tend to clear the half section in question of any lake and indeed to remove such permanent body of water wholly from the map. We are further inclined to believe that when the meander line deviates so far from the true shore as it does in this case, from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel, the error would be so gross as to warrant a re-survey.

Cragin *vs.* Powell, 128 U. S. 691;
Mich. L. L. Co. *vs.* Rust 168 *id.* 589.
Wiles & Cedar Point Club 175 *id.* 300.

186 While it is true the significant question before us is the condition that existed when the original survey was made, and that attempts to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud lake is shown on the plat to be.

2. Plaintiff rests his claim of title also upon adverse possession. It is said he and his grantors have been in possession of the disputed tract claiming title thereto for much more than ten years prior to the beginning of this action—that the swamp land act of 1850 was a grant *in præsenti* and that the statute of limitations will run against a county. The grant of swamp lands which had been surveyed and platted was *in præsenti* and it has been said passed title to the State, and from the State such title passed to the counties by the act of the General Assembly of 1853.

Smith *vs.* Miller, 105 Iowa 538;
Bailey *vs.* Callanan, 87 *id.* 107;
Am. Em. Co. *vs.* Fuller, 83 *id.* 599.

But it was an inchoate title only that passed under the act to the State. The legal title remained in the United States until a patent

was issued. Ogden *vs.* Buckley, decided at present term; Rogers L. Works *vs.* Am. Em. Co. 164 U. S. 559; Mich. L. & L. Co. *vs.* Rust, *supra*. Furthermore the swamp land act did not operate to convey any interest in lands unsurveyed at the date of its passage. A survey into legal subdivision is a necessary pre-requisite to the passing of title from the Government. Boynton *vs.* Miller 22 Iowa 579. So long as title remained in the United States the statute of limitations would not run.

Durham *vs.* Hussman 88 Iowa 29;
1 A. & E. Enc. of Law 875,

and cases there collected. This land was not surveyed until the year 1898. Before it was laid out into legal subdivisions, neither State or county could make a selection or assert any title to
187 it. See further on this point;
Iowa R. R. Land Co. *vs.* Adkins, 38 Iowa 351; Chicago R. I. & P. R. Co. *vs.* Allfree, 64 *id.* 500;

In our opinion the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be

Reversed.

188 In the Supreme Court of Iowa.

Filed Dec. 11, 1903. Jno. C. Crockett, Clerk Supreme Court.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, and Palo Alto County, Iowa, Defendants in Error. } Petition for Writ of Error.

To the supreme judges of the State of Iowa:

Your petitioner represents that on the 3rd day of June, A. D. 1902, there was rendered a decision in this court wherein George Schlosser was appellee and W. L. Hemphill, Richard Ryan and Palo Alto County, Iowa, were appellants, by which decision the judgment of the district court of Palo Alto county, Iowa, was reversed and judgment was rendered against appellee for the title to the land involved in said suit, towit: about 191 acres of land in the south ½ of section 30, township 97, range 34 in Palo Alto county, Iowa, and costs, said decision and judgment being based upon an erroneous construction by the supreme court of said State of Iowa of the rights of said Geo. Schlosser in and to said real estate under the acts of Congress of the United States.

Your petitioner further represents that he desires to take the opinion of the Supreme Court of the United States upon the ques-

tions therein involved, and that the construction of certain statutes of the United States is involved in said decision and judgment, and your petitioner further asks that a writ of error be allowed in said cause, whereby the same may be reviewed upon error in the Supreme Court of the United States; and your petitioner asks that a stay — execution may be had during the pendency of said cause in said court of the United States, and that a supersedeas bond be fixed in such sum as may be reasonable and just to secure the payment of said judgment.

GEO. E. CLARKE,
Attorney for Geo. Schlosser, Plaintiff in Error.

CHAS. A. CLARK, *Of Counsel.*

189 STATE OF IOWA, }
Kossuth County, } ss:

Geo. E. Clarke, being duly sworn deposes and says that he is the attorney for Geo. Schlosser, the plaintiff in error named in the foregoing petition; that he has read the foregoing petition and knows the facts stated therein, and that the same are true as he verily believes.

GEO. E. CLARKE.

Subscribed and sworn to before me by said Geo. E. Clarke this 8th day of December, 1903.

[Notarial Seal of John W. Sullivan, Iowa.]

JOHN W. SULLIVAN,
Notary Public.

190 In the Supreme Court of Iowa.

Filed Dec. 11, 1903. Jno. C. Crockett, Clerk Supreme Court.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO COUNTY, IOWA, Defendants in Error.

Geo. E. Clarke attorney for plaintiff in error.
E. B. Evans and A. E. Morling, attorneys for defendants in error.

Assignment of Errors.

Comes now George Schlosser and assigns error upon the decision and final judgment rendered in this cause in the opinion and decision filed herein by the judges of the supreme court of Iowa, on the 3rd day of June, A. D. 1902, as appears upon the face of the

record in said decision and judgment in the following particulars, to-wit:

1. Under the laws, statutes and decisions of the United States the meander line is not the boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the purpose of ascertaining the amount of land for which the Government charged upon the sale thereof

2. The court erred in holding and deciding in its said opinion and decision that plaintiff in error was not the owner of the real estate involved in said controversy.

3. The court erred in construing the laws of the United States not to convey title under the patents issued by plaintiff's grantor to lots 2 and 3 of section 30, township No. 97, range No. 34, west 5th P. M. Iowa.

4. The court erred in holding that under the swamp land act of September 28th, 1850 (9 Stat. at L. 520, Rev. Statutes. sec. 2479 *et seq.*), and patents of the United States dated October 10th, 1874, that plaintiff's mesne grantor did not acquire title to the land in controversy.

5. The court erred in holding that the swamp land act of September 28th, 1850, (9 Stat. at L. 520, Rev. Statutes. sec. 2479
191 *et seq.*), did not convey title prior to the survey of the land in question into legal subdivisions.

6. The court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to meander lines.

7. The court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to lands included in patents issued by the United States.

8. The court erred in holding that a new survey of the lands in controversy could affect plaintiff's title acquired by patent from the United States, dated October 10th, 1874.

9. The court erred in holding that there was any authority of law under the statutes and acts of Congress authorizing a re-survey or further survey of land under the facts disclosed in this case.

10. Under the statutes and various acts of Congress in relation to surveys and sales of the public domain, the original survey as disclosed in this case, and the sale by the Land Department of the United States, and the patents issued by the United States in pursuance of such sale, conveyed title to plaintiff's grantor, and plaintiff, by mesne conveyance from such grantor, took title to the land in controversy, and in said judgment and decision, the supreme court of Iowa erred in refusing to establish and quiet the title of plaintiff in error thereunder.

And thereupon, upon the foregoing assignment of errors, the said George Schlosser respectfully asks and prays that upon the writ of

error granted upon his petition and for the review of the errors herein assigned that the said judgment and decision of the supreme court of Iowa may be reversed, and the action, decision and judgment of the said supreme court of Iowa may be set aside; and said George Schlosser will ever pray.

GEO. E. CLARKE,
Attorney for George Schlosser, Plaintiff in Error.
CHAS. A. CLARK, *Of Counsel.*

192 [Endorsed:] In the supreme court of Iowa Geo. A. Schlosser plaintiff in error *vs.* W. L. Hemphill Richard Ryan & Palo Alto Co. Iowa defendants in error Petition for writ of error & assignment of errors Filed the 11th day of Dec. 1903. Charles A. Bishop, C. J. sup. court, Iowa. Geo. E. Clarke attorney for plaintiff in error

193 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between George Schlosser, plaintiff, and W. L. Hemphill, Richard Ryan and Palo Alto County, Iowa, defendants, wherein was drawn in question the construction of certain statutes of the United States affecting the right and ownership of the said George Schlosser to certain real estate in the south ½ of section No. 30 in township No. 97, north range 34, west 5th P. M. Iowa, and said decision being contrary to the rights of plaintiff under said statutes, and a manifest error has happened, to the great damage of said George Schlosser, as by his complaint appears, we, being willing that error, if error hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have the same at Washington on the 10th day of January next, in the said Supreme Court, to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
194 the Supreme Court of the United States, the 11th day of December, A. D. 1903.

[L. S.] EDWARD R. MASON,
Clerk U. S. C. C., Southern District of Iowa.

Allowed.
CHAS. A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

195 In the Supreme Court of Iowa.

GEO. SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, & PALO ALTO Co., Iowa, Defendant- in Error.
} Order Extending Time.

Be it remembered that on this 6 day of Jan. 1904 it appearing to the undersigned judge of the supreme court of Iowa who signed the citation here-fore issued herein that owing to a destructive fire wherein a portion of the capitol or state house of the State of Iowa was on the 4th inst. destroyed and owing to the confusion and delay incident thereto in the office of the clerk of the supreme court and owing also to the unusual amount of work the time for return in the above entitled case is hereby extended twenty days beyond the time fixed in the original writ issued herein.

Witnessed my hand this 6 day of Jan. 1904.

CHARLES A. BISHOP,
Judge of — Court of Iowa.

[Endorsed:] Filed Jan. 6, 1904. Jno. C. Crockett, clerk supreme court.

196 In the Supreme Court of Iowa.

GEO. SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, & PALO ALTO Co., Defendant- in Error.
} Order Extending Time.

STATE OF IOWA, *Polk County,* } *ss:*

John C. Crockett being duly sworn deposes and says he is the clerk of the supreme court of Iowa; that by reason of condition of affairs in his office, the large amount of work at hand at just the present time and the confussion and delay incident to the late fire in the wing of the capitol where his office is situated additional time is necessary to prepare and certify the record in the above entitled cause to the Supreme Court of the United States.

JOHN C. CROCKETT.

Subscribed and sworn to before me by John C. Crockett this 7" day of Jan. 1904.

[Notarial Seal of F. W. Crockett, Iowa.]

F. W. CROCKETT,
Notary Public, Polk County, Iowa.

[Endorsed:] Filed Jan. 7, 1904. Jno. C. Crockett, clerk supreme court.

197 STATE OF IOWA, ss:

I, Jno. C. Crockett, clerk of the supreme court of Iowa, do hereby certify, that the foregoing is a true and correct transcript of the record, decision of the supreme court of Iowa, and final judgment rendered in a cause entitled George Schlosser, *vs.* W. L. Hemphill, Richard Ryan, and Palo Alto Co. Iowa.

And I further certify that I have retained in my office true and correct copies of petition of writ of error, the writ, bond, citation, and assignment of errors, order extending time and affidavit and the original of the same I hereto attach and return herewith as a part of the return to said writ, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and official seal hereto attached at the city of Des Moines in the State of Iowa on this 14 day of January A. D. 1904.

[Seal of the Supreme Court of Iowa.]

JNO. C. CROCKETT,
Clerk of the Supreme Court of Iowa.

Endorsed on cover: File No. 19,204. Iowa supreme court. Term No. 175. George Schlosser, plaintiff in error, *vs.* W. L. Hemphill, Richard Ryan, & Palo Alto County, Iowa. Filed January 18", 1904. File No. 19,204.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL ET AL. } No. 175.

In error to the supreme court of the State of Iowa.

Stipulation.

I.

It is hereby stipulated that the record in this cause be amended by filing herein the annexed transcript of judgment in said cause by the supreme court of Iowa, the same to be printed with this stipulation, and to be taken and considered as a part of the record in said cause upon final submission and hearing.

II.

It is stipulated and admitted that the transcript of record hereto annexed shows the final judgment of the supreme court of Iowa entered in this cause, and that the said judgment was by inadvertence and oversight omitted by the clerk of said supreme court of Iowa in his return to the writ of error herein.

III.

This stipulation is entered into to obviate delay and expense in securing a full and perfect record in this court, and is designed to authorize an order by this court for amendment of the record as herein stipulated and set forth.

Dec. 6th, 1904.

CHAS. A. CLARK,
GEO. E. CLARKE,
Attorneys for Plaintiff in Error.
E. B. EVANS,
H. C. EVANS,
Attorneys for Defendants in Error.

Supreme Court of Iowa.

STATE OF IOWA, ss:

Be it remembered, that on the 3rd day of June A. D. 1902, the following proceedings, among others, were had and entered of record in the supreme court of Iowa, to-wit:

Appeal from Palo Alto district court.

GEORGE SCHLOSSER
vs.
W. L. HEMPHILL ET AL., Appellants. } No. 21489.

In this cause, the court being fully advised in the premises, file their written opinion reversing the judgment of the dist. court.

It is therefore considered by the court that the judgment of the court below be and it is hereby reversed and set aside and the cause is remanded for further proceedings in harmony with the opinion of this court and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellee pay the costs of this appeal, taxed at $227.70 and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the record entry of said court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

Seal of the Supreme Court of Iowa.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 1st day of December A. D. 1904.

JNO. C. CROCKETT,
Clerk Supreme Court,
By —— ——, *Deputy.*

[Endorsed:] File No. 19,204. Supreme Court U. S. October term 190–. Term No. 175. Geo. Schlosser, P. E., *vs.* W. L. Hemphill *et al.* Stipulation and addition to record. Filed Dec. 10, 1904.